Chapter 2

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The Legal Framework

A. Appropriations and Related Terminology

1. Introduction

The reader will find it useful to have a basic understanding of certain appropriations law terminology that will be routinely encountered throughout this publication, Some of our discussion will draw upon definitions which have been enacted into law for application in various budgetary contexts. Other definitions are drawn from custom and usage in the budget and appropriations process, in conjunction with administrative and judicial decisions.

In addition, 31 U.S.C. s 1112(c), previously noted in Chapter 1, requires the Comptroller General, in cooperation with the Treasury Department, Office of Management and Budget, and Congressional Budget Office, to maintain and publish standard terms and classifications for "fiscal, budget, and program information, " giving particular consideration to the needs of the congressional budget, appropriations, and revenue committees. Federal agencies are required by 31 U.S.C. §1112(d) to use this standard terminology when providing information to Congress.

The terminology developed pursuant to this authority is published in a GAO booklet entitled A Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d cd., March 1981) [hereinafter Glossary]. Unless otherwise noted, the terminology-used throughout this publication is based on the Glossary. The following sections present some of the more important terminology in the budget and appropriations process, Many other terms will be defined in the chapters which deal specifically with them.

2. Concept and Types of Budget Authority

Congress finances federal programs and activities by providing "budget authority." Budget authority is a general term referring to various forms of authority provided by law to enter into obligations which will result in immediate or future outlays of government funds. The statutory definition, effective beginning with fiscal year 1992, is:

"The term 'budget authority' means the authority provided by Federal law to incur financial obligations, as follows:

"(i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;

"(ii) borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;

"(iii) contract authority, which means the making of funds available for obligation but not for expenditure; and

"(iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority

"The term includes the cost for direct loan and loan guarantee programs, as those terms are defined by [the Omnibus Budget Reconciliation Act of 1990, Pub, L. No. 101-508,9 13201 (a)]." [1]

a. Appropriations

Appropriations are the most common form of budget authority. As we have seen in Chapter 1 in our discussion of the congressional "power of the purse," the Constitution prohibits the withdrawal of money from the Treasury unless authorized in the form of an appropriation enacted by Congress.[2] Thus, funds paid out of the United States Treasury must be accounted for by charging them to an appropriation provided by or derived from an act of Congress.

The term "appropriation" may be defined as:

"An authorization by an act of Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes. "[3]

[1] Section 3(2) of the Congressional Budget Act of 1974, 2 U.S.C. § 622(2), as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (November 5, 1990), §§13201(b) and 1321 l(a), 104 Stat. 1388-614 and 620. Prior to the Congressional Budget Act, the term "obligational authority" was frequently used instead of budget authority.

[2] The Constitution does not specify precisely what assets comprise the "Treasury" of the United States. An important statute in this regard is 31 U.S.C. § 3302(b), discussed in detail in Chapter 6, which requires that, unless otherwise provided, a government agency must deposit any funds received from sources other than its appropriations in the general fund of the Treasury, where they are then available to be appropriated as Congress may see fit.

[3] Glossary at 42; Andrus v. Sierra Club, 442 U.S. 347.359 n.18(1979). See also 31 C, SC. §§ 701(2) and 1101(2). The term "authorization" as used in this definition must be distinguished from an "authorization of appropriations" as described in Section C.1.

While other forms of budget authority may authorize the incurring of obligations, the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury. See, e.g., National Association of Regional Councils v. Costle, 564 F.2d 583,586 (D.C. Cir.1977); New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966). Thus, at some point if obligations are paid, they are usually paid by and from an appropriation. Section B. 1 of this chapter discusses in more detail precisely what types of statutes constitute appropriations.

Appropriations do not. represent cash actually set aside in the Treasury. They represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations, specified in the appropriation acts.

Appropriations are identified on financial documents by means of "account symbols" which are assigned by the Treasury Department based on the number and types of appropriations an agency receives and other types of funds it may control. An appropriation account symbol is a group of numbers, or a combination of numbers and letters, which identifies the agency responsible for the account, the period of availability of the appropriation, and the specific fund classification. Detailed information on reading and identifying account symbols is contained in the Treasury Financial Manual (I TFM Chapter 2-1500). Specific accounts for each agency are listed in a publication entitled Federal Account Symbols and Titles, issued quarterly as a supplement to the TFM.

b. Contract Authority

Contract authority is a form of budget authority which permits contracts or other obligations to be entered into in advance of an appropriation or in excess of amounts otherwise available in a revolving fund, Glossary at 42. It is to be distinguished from the inherent authority to enter into contracts possessed by every government agency but which is dependent upon the availability of funds.

Contract authority itself is not an appropriation; it provides the authority to enter into binding contracts but not the funds to make payments under them. Therefore, contract authority must be funded (or, in other words, the funds needed to liquidate obligations under the contracts must be provided) by a subsequent appropriation (called a "liquidating appropriation") or by the use of

receipts or offsetting collections authorized for that purpose. See B-228732, February 18, 1988; National Association of Regional Councils v. Costle, 564 F.2d 583,586 (D.C. Cir. 1977); OMB Circular No. A-n, §14.1(a) (1990); OMB Circular No. A-34, § 21.1 (1985).

Contract authority may be provided in appropriation acts (e.g., B-174839, March 20, 1984) or, more commonly, in other types of legislation (e.g., B-228732, February 18, 1988), Either way, the authority must be specific. 31 U.S.C. §1301(d). As we noted in Chapter 1, one of the objectives of the Congressional Budget Act of 1974 was to provide increased control by the appropriations process over various forms of so-called "backdoor spending" such as contract authority. To this end, legislation providing new contract authority will be subject to a point of order in either the Senate or the House of Representatives unless it also provides that the new authority will be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation acts. 2 U.S.C. § 651(a).

Contract authority has a "period of availability" analogous to that for an appropriation. Unless otherwise specified, if it appears in an appropriation act in connection with a particular appropriation, its period of availability will be the same as that for the appropriation. If it appears in an appropriation act without reference to a particular appropriation, its period of availability, again unless otherwise specified, will be the fiscal year covered by the appropriation act. 32 Comp. Gen. 29,31 (1952); B-76061, May 14, 1948; National Association of Regional Councils v. Costle, 564 F.2d 583,587-88 (D.C. Cir. 1977). This period of availability refers to the time period during which the contracts must be entered into, as distinguished from the duration of the contracts themselves, which is governed by the terms of the legislation granting the authority.

As noted above, appropriations generally constitute budget authority. However, an appropriation to liquidate contract authority is an important exception. Since contract authority itself constitutes new budget authority, an appropriation to liquidate that authority is not counted as new budget authority. This treatment is necessary to avoid counting the amounts twice. B-171630, August 14, 1975.

Since the contracts entered into pursuant to contract authority constitute obligations binding on the United States, Congress has little

practical choice but to make the necessary liquidating appropriations. B-228732, February 18, 1988; B-226887, September 17, 1987. As the Supreme Court has put it:

"The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations. "

Train v. City of New York, 420 U.S. 35,39 n.2 (1975). A failure or refusal by Congress to make the necessary appropriation would not defeat the obligation, and the party entitled to payment would most likely be able to recover in a lawsuit. E.g., B-211190, April 5, 1983.

c. Borrowing Authority

"Borrowing authority" is statutory authority (in a substantive or appropriation act) that permits a federal agency to incur obligations and to liquidate those obligations out of borrowed moneys.[4] Borrowing authority may consist of (a) authority to borrow from the Treasury (authority to borrow funds from the Treasury that are realized from the sale of public debt securities), (b) authority to borrow directly from the public (authority to sell agency debt securities), (c) authority to borrow from (sell agency debt securities to) the Federal Financing Bank, or (d) some combination of the above.

Borrowing from the Treasury is the most common form and is also known as "public debt financing." As a general proposition, GAO has traditionally expressed a preference for financing through direct appropriations on the grounds that the appropriations process provides enhanced congressional control. E.g., B-141869, July 26, 1961. The Congressional Budget Act met this concern to an extent by requiring generally that new borrowing authority, as with new contract authority, be limited to the extent or amounts provided in appropriation acts. 2 U.S.C. § 651(a). More recently, GAO has recommended that borrowing authority be provided only to those accounts which can generate enough revenue in the form of collections from nonfederal sources to repay their debt. Budget Issues: Agency Authority to Borrow Should be Granted More Selectively, GAO/AFMD-89-4 (September 1989).[5]

[4]Glossary at 42; OMB Circular No. A-11, §14.1(a) (1990).

[5]If an agency cannot repay with external collections, it must either extend its debt with new borrowings, seek appropriations to repay the debt, or seek to have the debt forgiven by statute. Repayment from external collections is the only alternative that reimburses the Treasury in any meaningful sense. See AFMD-89-4 at 17, 20.

d. Monetary Credits

A type of borrowing authority specified in the expanded definition of budget authority contained in the Omnibus Budget Reconciliation Act of 1990, is monetary credits. The monetary credit is a relatively uncommon concept in government transactions. At the present time, it exists mostly in a handful of statutes authorizing the government to use monetary credits to acquire property such as land or mineral rights. Examples are the Rattlesnake National Recreation Area and Wilderness Act of 1980, discussed in 62 Comp. Gen. 102 (1982), and the Cranberry Wilderness Act, discussed in B-211306, April 9, 1984.[6]

Under the monetary credit procedure, the government does not issue a check in payment for the acquired property. Instead, it gives the seller "credits" in dollar amounts reflecting the purchase price. The holder may then use these credits to offset or reduce amounts it owes the government in other transactions which may, depending on the terms of the governing legislation, be related or unrelated to the original transaction. The statute may use the term "monetary credit" (as in the Cranberry legislation) or some other designation such as "bidding rights" (as in the Rattlesnake Act). Where this procedure is authorized, the acquiring agency does not need to have appropriations or other funds available to cover the purchase price because no cash disbursement is made. An analogous device authorized for use by the Commodity Credit Corporation is "commodity certificates."[7]

The inclusion of monetary credits as budget authority has the effect of making them subject to the appropriation controls of the Congressional Budget Act, such as the requirements of 2 U.S.C. § 651.

e. Offsetting Receipts

The federal government receives money from numerous sources and in numerous contexts. For budgetary purposes, collections are classified in two major categories, governmental receipts and offsetting collections.*

[6]These and other examples are noted in GAO's report, Budget Treatment. of Monetary Credits, GAO/AFMD-85-21 (April 8, 1985).

[7]See Farm Payments: Cost and Other Information on USDA's Commodity Certificates, GAO/RCED-87-117BR (March 26, 1987).

[8]See Glossary at 46–49; OMB Circular No. A-1 1,8 14.1(d) (1990)

Governmental receipts or budget receipts are collections resulting from the government's exercise of its sovereign or regulatory powers. Examples are tax receipts, customs duties, and court fines. Collections in this category are deposited in receipt accounts and are compared against total outlays for purposes of calculating the budget surplus or deficit.

(offsetting collections are collections resulting from business-type or market-oriented activities, such as the sale of goods or services to the public, and intragovernmental transactions. Their budgetary treatment differs from governmental receipts in that they are offset against (deducted from or "netted against") budget authority in determining total outlays. Offsetting collections are also divided into two major categories.

First is offsetting collections credited to appropriation or fund accounts. These are collections which, under specific statutory authority, may be deposited in an appropriation or fund account under the control of the receiving agency, and which are then available for obligation by the agency subject to the purpose and time limitations of the receiving account.

Second is offsetting receipts. Offsetting receipts are offsetting collections which are deposited in a receipt account." For budgetary purposes, these amounts are deducted from budget authority by function or subfunction and by agency.[10]

The Balanced Budget and Emergency Deficit Control Act of 1985 first addressed the budgetary treatment of offsetting receipts by adding the authority "to collect offsetting receipts" to the definition of budget authority. The expanded definition in the Omnibus Budget Reconciliation Act of 1990 is more explicit. The authority to obligate and expend the proceeds of offsetting receipts and collections is treated as negative budget authority. In addition, the reduction of offsetting receipts or collections (e.g., legislation authorizing

[9]This usually means a general fund receipt account (miscellaneous receipts), but also includes amounts deposited in special or trust fund accounts An example of offsetting receipts deposited in a special receipt account is discussed in B-199216, July 21, 1980.

[10]H.R. Conf. Rep, No. 433, 99th Cong., 1st Sess. 102 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 988, 1020. This is the conference report on the Balanced Budget and Emergency Deficit Control Act of 1985.

an agency to forgo certain collections) is treated as positive budget authority.'[11]

f. Loan and Loan Guarantee Authority

A loan guarantee is an agreement, authorized by statute, by which the United States pledges to pay part or all of the loan principal and interest to a lender or holder of a security in the event of default by a third-party borrower.[12] The government does not know whether or to what extent it may be required to honor the guarantee until there has been a default. Loan guarantees are contingent liabilities which may not be recorded as obligations until the contingency occurs. See 64 Comp. Gen. 282, 289 (1985) and Chapter 11.

Prior to legislation enacted in November 1990, loan guarantees were expressly excluded from the definition of budget authority. Budget authority was created only when an appropriation to liquidate loan guarantee authority was made.

Statutory reform of the budgetary treatment of federal credit programs came about in two stages. First, the Balanced Budget and Emergency Deficit Control Act of 1985 added a definition of "credit authority" to the Congressional Budget Act, specifically, "authority to incur direct loan obligations or to incur primary loan guarantee commitments." 2 U.S.C. § 622(10).[13] Any bill, resolution, or conference report providing new credit authority will be subject to a point of order unless the new authority is limited to the extent or amounts provided in appropriation acts. 2 U.S.C. § 652(a).[14]

The second stage was the Federal Credit Reform Act of 1990,[15] effective starting with fiscal year 1992. Under this legislation, the

[11] This was the intent of the 1985 legislation, as reflected in the Conference report (supra note 10), although it had not been expressed in the legislation itself.

[12] Glossary at 6; OMB Circular No. A-11, § 33.2(b) (1990).

[13] The statute does not further define the term "primary loan guarantee"

[14] This is the same control device we have previously noted for contract authority and borrowing authority. Although loan guarantee authority was not viewed as budget authority in 1985, the apparent rationale was that the control, if it is to be employed, must apply at the authorization stage because the opportunity for control no longer exists by the time liquidating budget authority becomes necessary An example of a statute including this language is discussed in B-230951, March 10, 1989.

[15] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (November 5, 1990), § 13201(a), 104 Stat. 1388-609.

"cost" of loan and loan guarantee programs is budget authority. "Cost" means the estimated long-term cost to the government of a loan or loan guarantee (defaults, delinquencies, interest subsidies, etc.), calculated on a net present value basis, excluding administrative costs. Except for entitlement programs (the statute notes the guaranteed student loan program and the veterans' home loan guaranty program as examples) and certain Commodity Credit Corporation programs, new loan guarantee commitments may be made only to the extent budget authority to cover their costs is provided in advance or other treatment is specified in appropriation acts. Appropriations of budget authority are to be made to "credit program accounts," and the programs administered from revolving non-budgetary "financing accounts. "

The Credit Reform Act reflects the thrust of proposals by GAO, the Office of Management and Budget, the Congressional Budget Office, and the Senate Budget Committee. See GAO report, Budget Issues: Budgetary Treatment of Federal Credit Programs, GAO/AFMD-89-42 (April 1989), which includes a discussion of the "net present value" approach to calculating costs.

3. Some Related Concepts

a. Spending Authority

The Congressional Budget Act of 1974 introduced the concept of "spending authority." The term is a collective designation for authority provided in laws other than appropriation acts to obligate the United States to make payments. It includes, to the extent budget authority is not provided in advance in appropriation acts, permanent appropriations (such as authority to spend offsetting collections), the non-appropriation forms of budget authority described above (e.g., contract authority, borrowing authority, authority to forgo collection of offsetting receipts), entitlement authority, and any other authority to make payments. 2 U.S.C. §651(c)(2). The different forms of spending authority are subject to varying controls in the budget and appropriations process. For example, as noted previously, proposed legislation providing new contract authority or new borrowing authority will be subject to a point of order unless it limits the new authority to such extent or amounts as provided in appropriation acts.

Further information on spending authority maybe found in two 1987 GAO companion reports, one a summary presentation[16] and the other a detailed inventory. [17]

b. Entitlement Authority

Entitlement authority is statutory authority, whether temporary or permanent,

"to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation acts, to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law. "[18]

Entitlement authority is treated as spending authority during congressional consideration of the budget. In order to make entitlements subject to the reconciliation process, the Congressional Budget Act provides that proposed legislation providing new entitlement authority to become effective prior to the start of the next fiscal year will be subject to a point of order. 2 U.S.C. § 651(b)(1). Entitlement legislation which would require new budget authority in excess of the allocation made pursuant to the most recent budget resolution must be referred to the appropriations committees. Id. § 651(b)(2).

4. Types of Appropriations

Appropriations are classified in different ways for different purposes. Some are discussed elsewhere in this publication.]' The following classifications, although phrased in terms of appropriations, apply equally to the broader concept of budget authority.

a. Classification Based on Duration [20]

(1) One-year appropriation: an appropriation which is available for obligation only during a specific fiscal year. This is the most common type of appropriation. It is also known as a "fiscal year" or "annual" appropriation.

[16] Budget Issues: The Use of Spending Authority and permanent Appropriations is Widespread, GAO/AFMD-87-44 (July 1987).

[17] Budget Issues: Inventory of Accounts with Spending Authority and Permanent Appropriations, 1987, GAO/AFMD-87-44A (July 1987).

[18] 2 U.S.C. §§ 622(9), 651(c)(2)(C); Glossary at 57.

[19] Supplemental and deficiency appropriations: Chapter 6, section D; lump-sum and line-item appropriations: Chapter 6, Section F; continuing resolutions: Chapter 8.

[20] Glossary at 43; OMB Circular No. A-11, §14.1(a)(1990)

(2) Multiple-year appropriation: an appropriation which is available for obligation for a definite period of time in excess of one fiscal year.

(3) No-year appropriation: an appropriation which is available for obligation for an indefinite period. A no-year appropriation is usually identified by appropriation language such as "to remain available until expended. "

b. Classification Based on Presence or Absence of Monetary Limit [21]

(1) Definite appropriation: an appropriation of a specific amount of money.

(2) Indefinite appropriation: an appropriation of an unspecified amount of money. An indefinite appropriation may appropriate all or part of the receipts from certain sources, the specific amount of which is determinable only at some future date, or it may appropriate "such sums as may-be necessary" for a given purpose.

c. Classification Based on Permanency [22]

(1) Current appropriation: an appropriation made by the Congress in, or immediately prior to, the fiscal year or years during which it is available for obligation.

(2) Permanent appropriation: a "standing" appropriation which, once made, is always available for specified purposes and does not require repeated action by Congress to authorize its use.[23] Legislation authorizing an agency to retain and use offsetting receipts tends to be permanent; if so, it is a form of permanent appropriation.

d. Classification Based on Availability for New Obligations

(1) Unexpired appropriation: an appropriation which is available for incurring and recording new obligations.

(2) Expired appropriation: an appropriation which is no longer available to incur new obligations, although it may still be available

[21] Glossary at 43; OMB Circular No. .4-11,914. l(a) (.1990)

[22] Glossary at 44.

[23] This is similar to a no-year appropriation except that a no-year appropriation will be closed if it remains inactive for two consecutive fiscal years. 31 U.S.C. § 1555. In actual usage, the term "permanent appropriation" tends to be used more in reference to appropriations contained in permanent legislation, while "no-year appropriation" is used more to describe appropriations found in appropriation acts.

for the recording and/or payment (liquidation) of obligations properly incurred before the period of availability expired.

An appropriation may combine characteristics from more than one of the above groupings. For example, a "permanent indefinite" appropriation is open-ended as to both period of availability and amount. Examples are 31 U.S.C. § 1304 (payment of certain judgments against the United States) and 31 U.S.C. §1322(b)(2) (refunding amounts erroneously collected and deposited in Treasury).

e. Reappropriation

The term "reappropriation" means congressional action to continue the obligational availability, whether for the same or different purposes, of all or part of the unobligated portion of budget authority which has expired or would otherwise expire. Reappropriations are counted as new budget authority in the first. year for which the availability is extended.[24]

B. Some Basic Concepts

1. What Constitutes an Appropriation

The starting point is 31 U.S.C. §1301(d), which provides:

"A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made. "

Thus, the rule is that the making of an appropriation must be expressly stated. An appropriation cannot be inferred or made by implication, E.g., 50 Comp. Gen. 863 (1971).

"Regular annual and supplemental appropriation acts present no problems in this respect as they will be apparent on their face. They, as required by 1 U.S.C. § 105, bear the title "An Act making

[24]Glossary at 44; OMB Circular No. A-11, § 14.2(f) (1990). See also 31 U.S.C. §1301(b) (reappropriation for different purpose is to be accounted for as a new appropriation).

appropriations . . . ." However, there are situations in which statutes other than regular appropriation acts may be construed as making appropriations.

Under the above rule, while the authority must be expressly stated, it is not necessary that the statute actually use the word "appropriation." If the statute contains a specific direction to pay (as opposed to a mere authorization), and a designation of the funds to be used, such as a direction to make a specified payment or class of payments "out of any money in the Treasury not otherwise appropriated," then this amounts to an appropriation. 63 Comp. Gen. 331 (1984); 13 Comp. Gen. 77 (1933). See also 34 Comp. Gen. 590 (1955),

For example, a private relief act which directs the Secretary of the Treasury to pay, out of arty money in the Treasury not otherwise appropriated, a specified sum of money to a named individual constitutes an appropriation. 23 Comp. Dec. 167, 170 (1916). Another example is B-160998, April 13, 1978, concerning section 11 of the Federal Fire Prevention and Control Act of 1974, which authorizes the Secretary of the Treasury to reimburse local fire departments or districts for costs incurred in fighting fires on federal property. Since the statute directed the Secretary to make payments "from any moneys in the Treasury not otherwise appropriated" (i.e., it contained both the specific direction to pay and a designation of the funds to be used), the Comptroller General concluded that section 11 constituted a permanent indefinite appropriation.

Both elements of the test must be present. Thus, a direction to pay without a designation of the source of funds is not an appropriation. For example, a private relief act which contains merely an authorization and direction to pay but no designation of the funds to be used does not make an appropriation. 21 Comp. Dec. 867 (1915); B-26414, January 7, 1944.[25] Similarly, public legislation enacted in 1978 authorized the U.S. Treasury to make an annual prepayment to Guam and the Virgin Islands of the amount estimated to be collected over the course of the year for certain taxes, duties, and fees. While it was apparent that the prepayment at least for the first year would have to come from the general fund of

[25] A few early cases will be found which appear inconsistent with the proposition stated in the text. E.g., 6 Comp. Dec. 514, 516 (1899) and 4 Comp. Dec. 325,327 (1897). These cases predate the enactment in 1902 (32 Stat. 552, 560) of what is now 31 U.S.C. §1301(d) and should be disregarded.

the Treasury, the legislation was silent as to the source of the funds for the prepayments, both for the first year and for subsequent years. It was concluded that, while the statute may have established a permanent authorization, it was not sufficient under 31 U.S.C. § 1301(d) to constitute art actual appropriation. B-114808, August 7, 1979. (Congress subsequently made the necessary appropriation in Pub. L. No. 96-126,93 Stat. 954,966 (1979).)

The designation of a source of funds without a specific direction to pay is also not an appropriation. 67 Comp. Gen. 332 (1988).

Thus far, we have been talking about the authority to make disbursements from the general fund of the Treasury. There is a separate line of decisions establishing the proposition that statutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, constitute continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by the Congress, The reasoning is that, under 31 U.S.C. § 3302(b), all money received for the use of the United States must be deposited in the general fund of the Treasury absent statutory authority for some other disposition. Once the money is in the Treasury, it can be withdrawn only if Congress appropriates it.[26] Therefore, the authority for an agency to obligate or expend collections without further congressional action amounts to a continuing appropriation of the collections. E.g., United Biscuit Co. v. Wirtz, 359 F.2d 206,212 (D.C. Cir. 1965), cert. denied, 384 US. 971. This principle has been applied to revolving funds and various special deposit funds.

Cases involving the "special fund" principle fall into two categories. In the first group, the question is whether a particular statute authorizing the deposit and expenditure of a class of receipts makes those funds available for the specified purpose or purposes , without further congressional action. These cases, in other words, raise the basic question of whether the statute may be regarded as an appropriation. Cases answering this question in the affirmative include 59 Comp. Gen. 215 (1980) (mobile home inspection fees collected by the Secretary of Housing and Urban Development); B-228777, August 26, 1988 (licensing revenues received by the Commission on the Bicentennial); B-204078.2, May 6, 1988

[26] U.S. Constitution, art. I, § 9, cl, 7, discussed in Chapter 1, Section B.

(Panama Canal Revolving Fund); B-197118, January 14,1980 (National Defense Stockpile Transaction Fund); B-90476, June 14, 1950, See also 1 Comp. Gen. 704 (1922) (revolving fund created in appropriation act remains available beyond end of fiscal year where not specified otherwise).

The second group of cases involves the applicability of statutory restrictions or other provisions which by their terms apply to "appropriated funds" or exemptions which apply to "nonappropriated funds." For example, fees collected from federal credit unions and deposited in a revolving fund for administrative and supervisory expenses have been regarded as appropriated funds for various purposes. 63 Comp. Gen. 31 (1983), aff'd upon reconsideration, B-210657, May 25, 1984 (payment of relocation expenses); 35 Comp. Gen. 615 (1956) (restrictions on reimbursement for certain telephone calls made from private residences). Other situations applying the "special fund as appropriation" principle are summarized below:

- Various funds held to constitute appropriated funds for purposes of GAO's bid protest jurisdiction:[27] 65 Comp. Gen. 25 (1985) (funds received by National Park Service for visitor reservation services); 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority power program funds); 57 Comp. Gen. 311 (1978) (commissary surcharges).
- Applicability of other procurement laws: United Biscuit Co. v. Wirtz, 359 F.2d 206 (D.C. Cir. 1965), cert. denied, 384 U.S. 971 (Armed Services Procurement Act applicable to military commissary purchases); B-217281 -O. M., March 27, 1985 (federal procurement regulations applicable to Pension Benefit Guaranty Corporation revolving funds).
- User fee toll charges collected by the Saint Lawrence Seaway Development Corporation are "appropriated funds." However, many of the restrictions on the use of appropriated funds will nevertheless be inapplicable by virtue of the Corporation's organic legislation and its status as a corporation. B-193573, January 8, 1979, modified and affirmed by B-193573, December 19, 1979; B-217578, October 16, 1986. The December 1979 decision noted that the capitalization of a government corporation, whether a lump-sum appropriation in the form of capital stock or the authority to borrow through the issuance of long-term bonds to the United States Treasury, consists of "appropriated funds. "

[27]GAO regulations exempt nonappropriated fund procurements. 4 C.F.R. § 21.3(m)(8).

- User fees collected under Tobacco Inspection Act are appropriated funds and as such are subject to restrictions on payment of employee health benefits. 63 Comp. Gen. 285 (1984).
- The. Prison Industries Fund is an "appropriated fund" subject to the General Services Administration's surplus property regulations. 60 Comp. Gen. 323 (1981).

Other cases in this category are 50 Comp. Gen. 323 (1970); 35 Comp. Gen. 436 (1956); B-191761, September 22, 1978; B-67175, July 16, 1947.

In each of the special fund cases cited above, the authority to make payments from the fund involved was clear from the governing legislation. However, it was not necessary to address whether the legislation also satisfied 31 U.S.C. §1301(d), because that statute has long been construed as referring to the general fund of the Treasury and not to money authorized to be deposited in the Treasury as a "special fund." 13 Comp. Dec. 700 (1907); 13 Comp. Dec. 219 (1906). See also 59 Comp. Gen. 215,217 (1980).

Finally, the cases cited above generally involve statutes which specify the fund to which the collections are to be deposited. This is not essential, however. A statute which clearly makes receipts available for obligation or expenditure without further congressional action will be construed as authorizing the establishment of such a fund as a necessary implementation procedure. 59 Comp. Gen. 215 (1980) (42 U.S.C. § 5419); 13 Comp. Dec. 700 (1907); B-226520, April 3, 1987 (non-decision letter) (26 U.S.C. § 7475).

2. Specific vs. General Appropriations

a. General Rule

An appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation, unless there is something in the general appropriation to make it available in addition to the specific appropriation. In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not

have an option as to which to use, It must use the specific appropriation. Were this not the case, agencies could evade or exceed congressionally-established spending limits.

The cases illustrating this rule are legion.[28] Generally, the fact patterns and the specific statutes involved are of secondary importance. The point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a "back-up." A few cases are summarized as examples:

- A State Department appropriation for "publication of consular and commercial reports" could not be used to purchase books in view of a specific appropriation for "books and maps. " 1 Comp. Dec. 126 (1894), The Comptroller of the Treasury referred to the rule as having been well-established "from time immemorial." Id. at 127.
- The existence of a specific appropriation for the expenses of repairing the United States courthouse and jail in Nome, Alaska, precludes the charging of such expenses to more general appropriations such as "miscellaneous expenses, U.S. courts" or "support of prisoners, U.S. courts, " 4 Comp. Gen. 476 (1924).
- . A specific appropriation for the construction of an additional wing on the Navy Department Building could not be supplemented by a more general appropriation to build a larger wing desired because of increased needs. 20 Comp. Gen. 272 (1940).
- Appropriations of the District of Columbia Health Department could not be used to buy penicillin to be used for Civil Defense purposes because the District had received a specific appropriation for "all expenses necessary for the Office of Civil Defense. " 31 Comp. Gen. 491 (1952).

Further, the fact that an appropriation for a specific purpose is included as an earmark in a general appropriation does not. deprive it of its character as an appropriation for the particular purpose designated, and where such specific appropriation is available for the expenses necessarily incident. to its principal purpose, such incidental expenses may not be charged to the more general appropriation. 20 Comp. Gen. 739 (1941). In the cited decision, a general appropriation for the Geological Survey contained the provision

[28] A few are 64 Comp. Gen. 138 (1984); 36 Comp. Gen. 526 (1957); 17 Comp. Gen. 974 (1938); 5 Comp. Gen. 399 (1925).

"including not to exceed $45,000 for the purchase and exchange . . . of . . . passenger-carrying vehicles." It was held that the costs of transportation incident to the delivery of the purchased vehicles were chargeable to the specific $45,000 appropriation and not to the more general portion of the appropriation.

The rule has also been applied to expenditures by a government corporation from corporate funds for an object for which the corporation had received a specific appropriation, where the reason for using corporate funds was to avoid a restriction applicable to the specific appropriation. B-142011, June 19, 1969.

Of course, the rule that the specific governs over the general is not peculiar to appropriation law. It is a general principle of statutory construction and applies equally to provisions other than appropriation statutes. E.g., 62 Comp. Gen. 617 (1983); B-152722, August 16, 1965. However, another principle of statutory construction is that two statutes should be construed harmoniously so as to give maximum effect to both wherever possible. In dealing with non-appropriation statutes, the relationship between the two principles has been stated as follows:

"Where there is a seeming conflict between a general provision and a specific provision and the general provision is broad enough to include the subject to which the specific provision relates, the specific provision should be regarded as an exception to the general provision so that both may be given effect, the general applying only where the specific provision is inapplicable." B-163375, September 2, 1971.

As stated before, however, in the appropriations context, this does not mean that a general appropriation is available when the specific appropriation has been exhausted. Using the more general appropriation would be an unauthorized transfer (discussed later in this chapter) and would improperly augment the specific appropriation.

b. Two Appropriations Available for Same Purpose

There are situations in which either of two appropriations can be construed as available for a particular object, but neither can reasonably be called the more specific of the two. The rule in this situation is this: Where either of two appropriations may reasonably be construed as available for expenditures not specifically mentioned under either appropriation, the determination of the agency as to which of the two appropriations to use will not be questioned.

However, once the election has been made, the continued use of the appropriation selected to the exclusion of any other for the same purpose is required, in the absence of changes in the appropriation acts. 68 Comp. Gen. 337 (1989); 23 Comp. Gen. 827 (1944); 10 Comp. Gen. 440 (1931); 5 Comp. Gen. 479 (1926); 15 Comp. Dec. 101 (1908); 5 Op. Off. Legal Counsel 391 (1981).

In 59 Comp. Gen. 518 (1980), the Environmental Protection Agency received separate lump-sum appropriations for "Research and Development" and "Abatement and Control." A contract entered into in 1975 could arguably have been charged to either appropriation, but EPA had elected to charge it to Research and Development. Applying the above rule, the Comptroller General concluded that a 1979 modification to the contract had to be charged to Research and Development funds, and that the Abatement and Control appropriation could not be used.

Thus, in this type of situation (two appropriations, both arguably available, neither of which specifies the object in question), the agency may make an initial election as to which appropriation to use. However, once it has made that election and has in fact used the selected appropriation, it cannot thereafter, because of insufficient funds in the selected appropriation or for other reasons, change its election and use the other appropriation.

3. Transfer and Reprogramming

For a variety of reasons, agencies have a legitimate need for a certain amount of flexibility to deviate from their budget estimates. Two ways to shift money from one place to another are transfer and reprogramming. While the two concepts are related in this broad sense, they are nevertheless different.

a. Transfer

Transfer is the shifting of funds between appropriations. Glossary at 80. For example, if an agency receives one appropriation for Operations and Maintenance and another for Capital Expenditures, a shifting of funds from either to the other is a transfer.

The basic rule with respect to transfer is simple: Transfer is prohibited without statutory authority. The rule applies equally to (1)

transfers from one agency to another,[29] (2) transfers from one account to another within the same agency,[30] and (3) transfers to an interagency or intraagency working fund.[31] In each instance, statutory authority is required. An agency's erroneous characterization of a proposed transfer as a "reprogramming" is irrelevant. See B-202362, March 24, 1981.

The rule applies even though the transfer is intended as a temporary expedient (for example, to alleviate a temporary exhaustion of funds) and the agency contemplates reimbursement. Thus, without statutory authority, an agency cannot "borrow" from another account or another agency. 36 Comp. Gen. 386 (1956); 13 Comp. Gen. 344 (1934). An exception to this proposition is 31 U.S.C. 51534, under which an agency may temporarily charge one appropriation for an expenditure benefiting another appropriation of the same agency, as long as amounts are available in both appropriations and the accounts are adjusted to reimburse the appropriation initially charged during or as of the close of the same fiscal year. This statute was intended to facilitate "common service" activities. For example, an agency procuring equipment to be used jointly by several bureaus or offices within the agency funded under separate appropriations may initially charge the entire cost to a single appropriation and later apportion the cost among the appropriations of the benefiting components. See generally S. Rep. No. 1284, 89th Cong., 2d Sess. (1966), reprinted at 1966 U.S. Code Cong. & Admin. News 2340.

The prohibition against transfer is codified in 31 U.S.C. 51532, the first sentence of which provides:

"An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.'

[29] 7 Comp. Gen. 524 (1928); 4 Comp. Gen. 848 (1925); 17 Comp. Dec. 174 (1910). .4 case in which adequate statutory authority was found to exist is 5217093, January 9, 1985 (transfer from Japan-United States Friendship Commission to Department of Education to partially fund study of Japanese education).

[30] 65 Comp. Gen. 881 (1986); 33 Comp. Gem 216 (1953); 33 Comp. Gen. 214 (1953): 17 Comp. Dec. 7 (1910); B-206668, March 15, 1982; B-178205, April 13, 1976; B-164912-O.M., December 21, 1977.

[31] 26 Comp. Gen. 545, 548 (1947); 19 Comp. Gen. 774 (1940); 6 Comp. Gen. 748 (1927); 4 Comp. Gen. 703 (1925).

In addition to the express prohibition of 31 U.S.C. § 1532, an unauthorized transfer would violate 31 U.S.C. §1301(a) (which prohibits the use of appropriations for other than their intended purpose), would constitute an unauthorized augmentation of the receiving appropriation, and could, if the transfer led to overobligating the receiving appropriation, result in an Antideficiency Act violation as well. E.g., B-222009-O. M., March 3, 1986.

Some agencies have limited transfer authority either in permanent legislation or in appropriation act provisions. Such authority will commonly set a percentage limit on the amount that may be transferred from a given appropriation and/or the amount by which the receiving appropriation may be augmented. A transfer pursuant to such authority is, of course, entirely proper. B-167637, October 11, 1973. An example is 7 U.S.C. § 2257, which authorizes transfers between Department of Agriculture appropriations. The amount to be transferred may not exceed 7% of the "donor" appropriation, and the receiving appropriation may not be augmented by more than 7% except in extraordinary emergencies. Cases construing this provision include 33 Comp. Gen. 214 (1953); B-218812, January 23, 1987; B-123498, April 11, 1955; and B-218812-O. M., July 30, 1985.

If an agency has transfer authority of this type, its exercise is not precluded by the fact that the amount of the receiving appropriation had been reduced from the agency's budget request. B-151 157, June 27, 1963. Also, the transfer statute is an independent grant of authority and, unless expressly provided otherwise, the percentage limitations do not apply to transfers under any separate transfer authority the agency may have. B-239031, June 22, 1990.

Another type of transfer authority is illustrated by 31 U.S.C. § 1531, which authorizes the transfer of unexpended balances incident to executive branch reorganizations, but only for purposes for which the appropriation was originally available. Cases discussing this authority include 31 Comp. Gen. 342 (1952) and B-92288 et al., August 13, 1971.

Statutory transfer authority does not require any particular "magic words. " Of course the word "transfer" will help, but it is not necessary as long as the words that are used make it clear that transfer is being authorized. B-213345, September 26, 1986; B-217093, January 9, 1985; B-182398, March 29, 1976 (letter to Senator Laxalt), modified on other grounds by 64 Comp. Gen. 370 (1985).

Some transfer statutes have included requirements for approval by one or more congressional committees. In light of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), such "legislative veto" provisions are no longer valid. Whether the transfer authority to which the veto provision is attached remains valid depends on whether it can be regarded as severable from the approval requirement. This in turn depends on an evaluation, in light of legislative history and other surrounding circumstances, of whether Congress would have enacted the substantive authority without the veto provision. See, e.g., 6 Op. Off. Legal Counsel 520 (1982), in which the Justice Department concluded that a Treasury Department transfer provision was severable and therefore survived a legislative veto provision.

The precise parameters of transfer authority will, of course, depend on the terms of the statute which grants it. The analytical starting point is the second sentence of 31 U.S.C. § 1532:

> "Except as specifically provided by law, an amount authorized to be withdrawn and credited [to another appropriation account or to a working fund] is available for the same purpose and subject to the same limitations provided by the law appropriating the amount."

A number of GAO decisions, several predating the enactment of 31 U.S.C. § 1532, have made essentially the same points—that, except to the extent the statute authorizing a transfer provides otherwise, transferred funds are available for purposes permissible under the donor appropriation and are subject to the same limitations and restrictions applicable to the donor appropriation.[32]

Restrictions applicable to the receiving account but not to the donor account may or may not apply. Where transfers are intended to accomplish a purpose of the source appropriation (Economy Act transactions, for example), transferred funds have been held not subject to such restrictions. E.g., 21 Comp. Gen. 254 (1941); 18 Comp. Gen. 489 (1938); B-35677, July 27, 1943; B-131580-O. M., June 4, 1957. However, for transfers intended to permit a limited augmentation of the receiving account (7 U.S.C. 82257, for example),

[32]E.g., 31 Comp. Gen. 109.114-15 (1951); 28 Comp. Gen. 365 (1948); 26 Comp. Gen. 545,548 (1947); 18 Comp. Gen. 489 (1938); 17 Comp. Gen. 900 (1938); 17 Comp. Gen. 73 (1937); 16 Comp. Gen. 545 (1936); B-167034-O. M., January 20, 1970.

this principle is arguably inapplicable in view of the fundamentally different purpose of the transfer.

As noted above, in the context of working funds, the prohibition against transfer applies not only to interagency funds, but to the consolidation of all or parts of different appropriations of the same agency into a single fund as well. In a few instances, the "pooling" of portions of agency unit appropriations has been found authorized where necessary to implement a particular statute. In B-195775, September 10, 1979, the Comptroller General approved the transfer of portions of unit appropriations to an agency-wide pool to be used to fund the Merit Pay System established by the Civil Service Reform Act of 1978. The transfers, while not explicitly authorized in the statute, were seen as necessary to implement the law and carry out the legislative purpose. Following this decision, the Comptroller General held in 60 Comp. Gen. 686 (1981) that the Treasury Department could "pool" portions of appropriations made to several separate bureaus to fund an Executive Development Program also authorized by the Civil Service Reform Act. However, pooling which would alter the purposes for which funds were appropriated is an impermissible transfer unless authorized by statute. E.g., B-209790 -O. M., March 12, 1985.

The reappropriation of an unexpended balance for a different purpose is a form of transfer. Such funds cease to be available for the purposes of the original appropriation. 18 Comp. Gen. 564 (1938); A-79180, July 30, 1936. Cf. 31 U.S.C. § 1301(b) (reappropriation for different purpose to be accounted for as a new appropriation). If the reappropriation is of an amount "not to exceed" a specified sum, and the full amount is not needed for the new purpose, the balance not needed reverts to the source appropriation. 18 Comp. Gen. at 565.

The prohibition against transfer would not apply to transfers of administrative allocations within a lump-sum appropriation since the allocations are not legally binding.[33] Thus, where the (then) Department of Health, Education, and Welfare received a lump-sum appropriation covering several grant programs, it could set aside a portion of each program's allocation for a single fund to be used for

[33]The agency must be careful that. a transfer of administrative allocations does not, under its own fund control regulations, produce a violation of 31 U.S.C. §1517(a), discussed further in Chapter 6.

"cross-cutting" grants intended to serve more than one target population, as long as the grants were for projects within the scope or purpose of the lump-sum appropriation. B-157356, August 17, 1978.

b. Reprogramming

A few years ago, the Deputy Secretary of Defense made the following statement:

"The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements. "[34]

The thrust of this statement, while made from the perspective of the Defense Department, applies at least to some extent to all agencies.

Reprogramming is the utilization of funds in an appropriation account for purposes other than those contemplated at the time of appropriation.[35] In other words, it is the shifting of funds from one object to another within an appropriation. The term "reprogramming" appears to have come into use in the mid-1950s although the practice, under different names, pre-dates that time.[36]

The authority to reprogram is implicit in an agency's responsibility to manage its funds; no statutory authority is necessary. See, e.g., 4B Op. Off. Legal Counsel 701 (1980), discussing the Attorney General's authority to reprogram to avoid deficiencies; B-196854.3, March 19, 1984 (Congress is "implicitly conferring the authority to reprogram" by enacting lump-sum appropriations). Indeed, reprogramming is usually a non-statutory arrangement. This means that there is no general statutory provision either authorizing or prohibiting it, and it has evolved largely in the form of informal (i.e., non-statutory) agreements between various agencies and their

[34]Remarks Prepared for Delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, before the House Armed Services Committee Concerning Reprogramming Action Within the Department of Defense, September 30, 1985 (unprinted).

[35]Glossary at 74; B-164912-O. M., December 21, 1977.

[36]Louis Fisher presidential Spending Power 76-77 (1975). Fisher also briefly traces the evolution of the concept.

congressional oversight committees. These informal arrangements do not have the force and effect of law. Blackhawk Heating& Plumbing Co. v. United States, 622 F.2d 539, 548 (Ct. Cl. 1980). See also 56 Comp. Gen. 201 (1976), holding that the Navy's failure to complete a form required by Defense Department reprogramming regulations was not sufficient to support a claim for proposal preparation costs by an unsuccessful bidder upon cancellation of the proposal.

Thus, as a matter of law, an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited. E.g., B-123469, May 9, 1955. This is true even though the agency may already have administratively allotted the funds to a particular object. 20 Comp. Gen. 631 (1941). In some situations, the agency's discretion may rise to the level of a duty. E.g., Blackhawk Heating& Plumbing at 552 n.9 (satisfaction of obligations under a settlement agreement).

There are at present no reprogramming guidelines applicable to all agencies. As one might expect, reprogramming policies, procedures, and practices vary considerably among agencies.[37] In view of the nature of its activities and appropriation structure, the Defense Department has the most detailed and sophisticated procedures.[38]

In some cases, Congress has attempted to regulate reprogramming by statute, and of course any applicable statutory provisions control. B-164912-O.M., December 21, 1977. For example, a provision frequently found in Defense Department appropriation acts prohibits the use of funds to prepare or present a reprogramming request to the Appropriations Committees "where the item for

[37]GAO reports in this area include Economic Assistance: Ways to Reduce the Reprogramming Notification Burden and Improve Congressional Oversight, GAO/NSIAD-89-202 (September 1989) (foreign assistance reprogramming); Budget Reprogramming: Opportunities to Improve DOD's Reprogramming Process, GAO/NSIAD-89-138 (July 1989); Budget Reprogramming: Department of Defense Process for Reprograming Funds, GAO/NSIAD-86-164BR (July 1986).

[38]See Reprogramming of Appropriated fin&, Department of Defense Directive No. 7250.5 (1980); Implementation of Reprogramming of Appropriated Funds, Department of Defense Instruction No. 7250.10 (1980).

which reprogramming is requested has been denied by the Congress."[39] The Comptroller General has construed this provision as prohibiting a reprogramming request which would have the effect of restoring funds which had been specifically deleted in the legislative process; that is, the provision is not limited to the denial of an entire project. See GAO report entitled Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974, LCD-75-315 (January 20, 1975).

Under Defense's arrangement as reflected in its written instructions, reprogramming procedures apply to funding shifts between program elements, but not to shifts within a program element. Thus, the denial of a request to reprogram funds from one program element to another does not preclude a military department from shifting available funds within the element. 65 Comp. Gen. 360 (1986). In other words, all funding shifts are not necessarily "reprogrammings." The level at which reprogramming procedures and restrictions will apply depends on applicable legislation, if any, and the arrangements an agency has worked out with its respective committees.

In the absence of a statutory provision such as the Defense provision noted above, a reprogramming which has the effect of restoring funds deleted in the legislative process has been held not legally objectionable. B-195269, October 15, 1979.

Reprogramming frequently involves some form of notification to the appropriations and/or legislative committees. In a few cases, the notification process is prescribed by statute. However, in most cases, the committee review process is non-statutory, and derives from instructions in committee reports, hearings, or other correspondence. Sometimes, in addition to notification, reprogramming arrangements also provide for committee approval. As in the case of transfer, under the Supreme Court's Chadha decision, statutory committee approval or veto provisions are no longer permissible. However, an agency may continue to observe committee approval procedures as part of its informal arrangements, although they would not be legally binding. B-196854.3, March 19, 1984.

[39] E.g., Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9015, 103 Stat. 1112, 1132 (1989).

In sum, reprogramming procedures provide an element of congressional control over spending flexibility short of resort to the full legislative process. They are for the most part non-binding, and compliance is largely a matter of "keeping faith" with the pertinent committees.

4. General Provisions: When Construed as Permanent Legislation

Appropriation acts, in addition to making appropriations, frequently contain a variety of provisions either restricting the availability of the appropriations or making them available for some particular use. Such provisions come in two forms: (a) "provisos" attached directly to the appropriating language, and (b) general provisions. A general provision may apply solely to the act in which it is contained ("No part of any appropriation contained in this Act shall be used . . ."), or it may have general applicability ("No part of any appropriation contained in this or any other Act shall be used ., .").40 Provisions of this type are no less effective merely because they are contained in appropriation acts. It. is settled that Congress can enact general or permanent legislation in appropriation acts. E.g., United States v. Dickerson, 310 U.S. 554 (1940); Cella v. United States, 208 F.2d 783,790 (7th Cir. 1953), cert. denied, 347 US. 1016; NLRB v. Thompson Products, Inc., 141 F.2d 794,797 (9th Cir. 1944); 41 Op. Att'y Gen. 274,276 (1956). General provisions may be phrased in the form of restrictions or positive authority.

As noted in Chapter 1, rules of both the Senate and the House of Representatives prohibit "legislating" in appropriation acts. However, this merely subjects the provision to a point of order and does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained. Thus, once a given provision has been enacted into law, the question of whether it is "general legislation" or merely a restriction on the use of an appropriation, i.e., whether it might have been subject to a point of order, is academic.

This section deals with the question of when provisos or general provisions appearing in appropriation acts can be construed as permanent. legislation.

40In recent decades. general provisions of government-wide applicability-—the "this or any other act"' provisions-have, for the most part, been consolidated in the annual Treasury, Postal Service, and General Government appropriation acts, E.g., Pub. L. No. 101-136, Title VI, 103 Stat., 783,816 (1989) (fiscal year 1990).

Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity, such as "hereafter," or if the provision is of a general character bearing no relation to the object of the appropriation, 65 Comp. Gen. 588 (1986); 62 Comp. Gen. 54 (1982); 36 Comp. Gen. 434 (1956); 32 Comp. Gen. 11 (1952); 24 Comp. Gen. 436 (1944); 10 Comp. Gen. 120 (1930); 5 Comp. Gen. 810 (1926); 7 Comp. Dec. 838 (1901).

In analyzing a particular provision, the starting point in ascertaining Congress' intent is, as it must be, the language of the statute. The question to ask is whether the provision uses "words of futurity." The most common "word of futurity" is "hereafter" and provisions using this term will usually be construed as permanent. For specific examples, see Cella v. United States, 208 F.2d at 790; 70 Comp. Gen. (B-242142, March 22, 1991); 26 Comp. Gen. 354,357 (1946); 2 Comp. Gen. 535 (1923); 11 Comp. Dec. 800 (1905); B-108245, March 19, 1952; B-100983, February 8, 1951; B-76782, June 10, 1948. The precise location of the word "hereafter" may be important. It may not be sufficient, for example, if it appears only in an exception clause and not in the operative portion of the provision. B-228838, September 16, 1987.

Words of futurity other than "hereafter" have also been deemed sufficient. Thus, there is no significant difference in meaning between "hereafter" and "after the date of approval of this act." 65 Comp. Gen. 588,589 (1986); 36 Comp. Gen. 434,436 (1956); B-209583, January 18, 1983. Using a specific date rather than a general reference to the date of enactment produces the same result.. B-57539, May 3, 1946. "Henceforth" will also do the job. B-209583, January 18, 1983. So will specific references to future fiscal years. B-208354, August 10, 1982.

In 24 Comp. Gen. 436 (1944), the words "at any time" were viewed as words of futurity in a provision which authorized reduced transportation rates to military personnel who were "given furloughs at any time." In that decision, however, the conclusion of permanence was further supported by the fact that Congress appropriated

funds to carry out the provision in the following year as well, and did not repeat the provision but merely referred to it.

The words "or any other act" in a provision addressing funds appropriated in or made available by "this or any other act" are not words of futurity. They merely refer to any other appropriation act for the same fiscal year. 65 Comp. Gen. 588 (1986); B-230110, April 11, 1988; B-228838, September 16, 1987; B-145492, September 21, 1976.[41] See also A-88073, August 19, 1937 ("this or any other appropriation"). Similarly, the words "notwithstanding any other provision of law" are not words of futurity. B-208705, September 14, 1982.

The words "this or any other act" maybe used in conjunction with other language that makes the result, one way or the other, indisputable. The provision is clearly not permanent if the phrase "during the current fiscal year" is added. Norcross v. United States, 142 Ct. Cl. 763 (1958). Addition of the phrase "with respect to any fiscal year" makes the provision permanent. B-230110, April 11, 1988.

If words of futurity indicate permanence, it follows that a proviso or general provision that does not contain words of futurity will generally not be construed as permanent 65 Comp. Gen. 588 (1986); 32 Comp. Gen. 11 (1952); 20 Comp. Gen. 322 (1940); 10 Comp. Gen. 120 (1930); 5 Comp. Gen. 810 (1926); 3 Comp. Gen. 319 (1923); B-209583, January 18, 1983; B-208705, September 14, 1982; B-66513, May 26, 1947; A-18614, May 25, 1927. The courts have applied the same analysis. See United States v. Vulte, 233 U.S. 509.514 (1914); Minis v. United States, 40 U.S. (15 Pet.) 423 (1841); United States v. International Business Machines Corp., 892 F.2d 1006, 1009 (Fed. Cir. 1989); NLRB v. Thompson Products, Inc., 141 F.2d 794, 798 (9th Cir. 1944); City of Hialeah v. United States Housing Authority, 340 F. Supp. 885 (S.D. Fla. 1971).

As the preceding paragraphs indicate, the language of the statute is the crucial determinant. However, other factors may also be taken into consideration. Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or

[41] One early case found the words "or any other act" sufficient words of futurity. 26 Comp. Dec. 1066 (1920). A later decision, B-37032, October 5, 1943, regarded their effect as inconclusive. Both of these cases must be regarded as implicitly modified by the consistent position expressed in the more recent decisions.

intended by Congress to be permanent. 32 Comp. Gen. 11 (1952); 10 Comp. Gen. 120 (1930); A-89279, October 26, 1937; 41 Op. Att'y Gen. 274, 279-80 (1956). However, where adequate words of futurity exist, the repetition of a provision in the following year's appropriation act has been viewed simply as an "excess of caution." 36 Comp. Gen. 434, 436 (1956). This factor is of limited usefulness, since the failure to repeat in subsequent appropriation acts a provision which does not contain words of futurity can also be viewed as an indication that Congress did not consider it to be permanent and simply did not want it to continue. See 18 Comp. Gen. 37 (1938); A-88073, August 19, 1937. Thus, if the provision does not contain words of futurity, repetition or non-repetition lead to the same result—that the provision is not permanent. If the provision does contain words of futurity, non-repetition indicates permanence but repetition, although it suggests non-permanence, is inconclusive.

The inclusion of a provision in the United States Code is relevant as an indication of permanence but is not controlling. 36 Comp. Gen. 434 (1956); 24 Comp. Gem 436 (1944). Failure to include a provision in the Code would appear to be of no significance. A reference by the codifiers to the failure to reenact a provision suggests nonpermanence. 41 Op. Att'y Gen. at 280-81.

Legislative history is also relevant, but has been used for the most part to support a conclusion based on the presence or absence of words of futurity. See 65 Comp. Gen. 588 (1986); B-209583, January 18, 1983; B-208705, September 14, 1982; B-108245, March 19, 1952; B-57539, May 3, 1946; Cella v. United States, 208 F.2d at 790 n.1; NLRB v. Thompson Products, 141 F.2d at 798. In B-192973, October 11, 1978, a general provision requiring the submission of a report "annually to the Congress" was held not permanent in view of conflicting expressions of congressional intent. Legislative history by itself has not been used to find futurity where it is missing in the statutory language.

The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriating language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence. For example, a provision prohibiting the retroactive application of an energy tax

credit provision in the Internal Revenue Code was found sufficiently unrelated to the rest of the act in which it appeared, a supplemental appropriations act, to support a conclusion of permanence. B-214058, February 1, 1984. See also 62 Comp. Gen. 54,56 (1982); 26 Comp. Gen. 354,357 (1946); 32 Comp. Gen. 11 (1952); B-37032, October 5, 1943; A-88073, August 19, 1937. The closer the relationship, the less likely it is that the provision will be viewed as permanent. A determination under rules of the Senate that a proviso is germane to the subject matter of the appropriation bill will negate an argument that the proviso is sufficiently unrelated as to suggest permanence. B-208705, September 14, 1982.

The phrasing of a provision as positive authorization rather than a restriction on the use of an appropriation is an indication of permanence, but usually has been considered in conjunction with a finding of adequate words of futurity. 36 Comp. Gen. 434 (1956); 24 Comp. Gen. 436 (1944). An early decision, 17 Comp. Dec. 146 (1910), held a proviso to be permanent based solely on the fact that it was not phrased as a restriction on the use of the appropriation to which it was attached, but this decision seems inconsistent with the weight of authority and certainly with the Supreme Court's decision in Minis v. United States, cited above.

Finally, a provision may be construed as permanent if construing it as temporary would render the provision meaningless or produce an absurd result. 65 Comp. Gen. 352 (1986); 62 Comp. Gen. 54 (1982); B-200923, October 1, 1982. These decisions dealt with a general provision designed to prohibit cost-of-living pay increases for federal judges except as specifically authorized by Congress. The provision appeared in a continuing resolution which expired on September 30, 1982. The next applicable pay increase would have been effective October 1, 1982. Thus, if the provision were not construed as permanent, it would have been meaningless "since it would have been enacted to prevent increases during a period when no increases were authorized to be made." 62 Comp. Gen. at 56-57. Similarly, a provision was held permanent in 9 Comp. Gen. 248 (1929) although it contained no words of futurity, because it was to become effective on the last day of the fiscal year and an alternative construction would have rendered it effective for only one day, clearly not the legislative intent. See also 65 Comp. Gen. 588, 590 (1986); B-214058, February 1, 1984.

In sum, the six additional factors mentioned above are all relevant as indicia of whether a given provision should be construed as permanent. However, the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence. Four of the factors—occurrence or nonoccurrence in subsequent appropriation acts, inclusion in United States Code, legislative history, and phrasing as positive authorization—have never been used as the sole basis for finding permanence in a provision without words of futurity. The two remaining factors—relationship to rest of statute and meaningless or absurd result—can be used to find permanence in the absence of words of futurity, but the conclusion is almost invariably supported by at least one of the other factors such as legislative history.

C. Relationship of Appropriations to Other Types of Legislation

1. Distinction Between Authorization and Appropriation

Appropriation acts must be distinguished from two other types of legislation: "enabling" or "organic" legislation and "appropriation authorization" legislation. Enabling or organic legislation is legislation which creates an agency, establishes a program, or prescribes a function, such as the Department of Education Organization Actor the Federal Water Pollution Control Act. While the organic legislation may provide the necessary authority to conduct the program or activity, it, with relatively rare exceptions, does not provide any money.

Appropriation authorization legislation, as the name implies, is legislation which authorizes the appropriation of funds to implement the organic legislation. It maybe included as part of the organic legislation or it may be separate. As a general proposition, it too does not. give the agency any actual money to spend. With certain exceptions (discussed in Section B. 1 of this chapter), only the appropriation act itself permits the withdrawal of funds from the Treasury. The principle has been stated as follows:

"The mere authorization of an appropriation does not authorize expenditures on the faith thereof or the making of contracts obligating the money authorized to be appropriated."

16 Comp. Gen. 1007, 1008 (1937). Restated, an authorization of appropriations does not constitute an appropriation of public funds, but contemplates subsequent legislation by the Congress actually appropriating the funds. 35 Comp. Gen. 306 (1955); 27 Comp. Dec. 923 (1921).[42]

Like the organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular subject matter, whereas the appropriation bills are exclusively within the jurisdiction of the appropriations committees.

There is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act. The existence of a statute (organic legislation) imposing substantive functions upon an agency which require funding for their performance is itself sufficient authorization for the necessary appropriations. B-173832, July 16, 1976; B-173832, August 1, 1975; B-111810, March 8, 1974. However, statutory requirements for authorizations do exist in a number of specific situations. An example is section 660 of the Department of Energy Organization Act, 42 U.S.C. § 7270 ("Appropriations to carry out the provisions of this chapter shall be subject to annual authorizations"). Another example is 10 U.S.C. § 114(a), which provides that no funds may be appropriated for military construction, military procurement, and certain related research and development "unless funds therefor have been specifically authorized by law."

In addition, rules of the House of Representatives prohibit appropriations for expenditures not previously authorized by law. See Rule XXI(2), Rules of the House of Representatives. The effect of this Rule is to subject the offending appropriation to a point of order. A more limited provision exists in Rule XVI, Standing Rules of the Senate.

[42]See also 67 Comp. Gen. 332 (1988); 37 Comp. Gen. 732 (1958); 26 Comp. Gen. 452 (1947); 15 Comp. Gen. 802 (1936); 4 Comp. Gen. 219 (1924); A-27765, July 8, 1929

The majority of appropriations today are preceded by some form of authorization although, as noted, it is not statutorily required in all cases.

Authorizations take many different forms, depending in part on whether they are contained in the organic legislation or are separate, Authorizations contained in organic legislation may be "definite" (setting dollar limits either in the aggregate or for specific fiscal years) or "indefinite" (authorizing "such sums as may be necessary to carry out the provisions of this act"). An indefinite authorization serves little purpose other than to comply with House Rule XXI. Appropriation authorizations enacted as separate legislation resemble appropriation acts in structure, for example, the annual Department of Defense Authorization Acts.

An authorization act is basically a directive to the Congress itself which Congress is free to follow or alter (up or down) in the subsequent. appropriation act. A statutory requirement for prior authorization is also essentially a congressional mandate to itself. Thus, for example, if Congress appropriates money to the Defense Department in violation of 10 U.S.C. § 114, there are no practical consequences. The appropriation is just as valid, and just as available for obligation, as if section 114 had been satisfied or did not exist.

In sum, the typical sequence is: (1) organic legislation, (2) authorization of appropriations, if not contained in the organic legislation, and (3) the appropriation act. While this may be the "normal" sequence, there are deviations and variations, and it is not always possible to neatly label a given piece of legislation. Consider, for example, the following:

"The Secretary of the Treasury is authorized and directed to pay to the Secretary of the Interior . . for the benefit of the Coushatta Tribe of Louisiana . . out of any money in the Treasury not otherwise appropriated, the sum of $1,300,000."[43]

This is the first section of a law enacted to settle land claims by the Coushatta Tribe against the United States and to prescribe the use and distribution of the settlement funds. Applying the test described above in Section B.1, it is certainly an appropriation—it contains a specific direction to pay and designates the funds to be

[43]Pub.L.No. 100-411, § 1(a)(1), 102 Stat. 1097 (1988).

used—but, in a technical sense, it is not an appropriation act. Also, it contains its own authorization. Thus, we have an authorization and an appropriation combined in a statute that is neither an authorization act (in the sense described above) nor an appropriation act. General classifications may be useful and perhaps essential, but they should not be expected to cover all situations.

2. Specific Problem Areas and the Resolution of Conflicts

a. Introduction

Appropriation acts, as we have seen, do not exist in a vacuum. They are enacted against the backdrop of program legislation and, in many cases, specific authorization acts, This section deals with two broad but closely related issues. First, what precisely can Congress do in an appropriation act? Is it limited to essentially "rubber stamping" what has previously been authorized? Second, what does an agency do when faced with what it perceives to be an inconsistency between an appropriation act and some other statute?

The remaining portions of this section raise these issues in a. number of specific contexts. In this introduction, we present four important. principles. The resolution of problems in the relationship of appropriation acts to other statutes will almost invariably lie in the application of one or more of these principles.

First, as a general proposition, appropriations made to carry out authorizing laws "are made on the basis that the authorization acts in effect constitute an adjudication or legislative determination of the subject matter. " B-151 157, June 27, 1963. Thus, except as specified otherwise in the appropriation act, appropriations to carry out enabling or authorizing laws must be expended in strict accord with the original authorization both as to the amount of funds to be expended and the nature of the work authorized. 36 Comp. Gen. 240, 242 (1956); B-220682, February 21, 1986; B-204874, July 28, 1982; B-125404, August 31, 1956; B-151157, June 27, 1963, While it is true that one Congress cannot bind a future Congress, nor can it bind subsequent action by the same Congress, an authorization act is more than an academic exercise and its requirements must be followed unless changed by subsequent legislation.

Second, Congress is free to amend or repeal prior legislation as long as it does so directly and explicitly and does not violate the Constitution. It is also possible for one statute to implicitly amend or repeal a prior statute, but it is firmly established that "repeal by implication" is disfavored, and statutes will be construed to avoid this result whenever reasonably possible. E.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-90 (1978); Morton v. Mancari, 417 U.S. 535,549 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936); 68 Comp. Gen. 19, 22-23 (1988); 64 Comp. Gen. 143, 145 (1984); 58 Comp. Gen. 687, 691-92 (1979); 53 Comp. Gen. 853,856 (1974); 34 Comp. Gen. 170, 172-73 (1954); 21 Comp. Gen. 319, 322-23 (1941); B-236057, May 9, 1990. A repeal by implication will be found only where "the intention of the legislature to repeal [is] clear and manifest," Posadas, 296 U.S. at 503.

A corollary to the "cardinal rule" against repeal by implication, or perhaps another way of saying the same thing, is the rule of construction that statutes should be construed harmoniously so as to give maximum effect to both wherever possible. E.g., Posadas, 296 US. at 503; 53 Comp. Gen. at 856; B-208593.6, December 22, 1988.

Third, if two statutes are in irreconcilable conflict, the more recent statute, as the latest expression of Congress, governs. As one court concluded in a statement illustrating the eloquence of simplicity:

"The statutes are thus in conflict, the earlier permitting arid the later prohibiting. The later statute supersedes the earlier. "

Eisenberg v. Corning, 179 F.2d 275, 277 (D.C. Cir. 1949). In a sense, the "last in time" rule is yet another way of expressing the repeal by implication principle. We state it separately to highlight its narrowness: it applies only when the two statutes cannot be reconciled in any reasonable manner, and then only to the extent of the conflict. E.g., Posadas, 296 U.S. at 503; B-203900, February 2, 1989; B-226389, November 14, 1988; B-214172, July 10, 1984, aff'd upon reconsideration, 64 Comp. Gen. 282 (1985).

The fourth principle we state in two parts:

(a) Despite the occasional comment to the contrary in judicial decisions (a few of which we will note later), Congress can and does "legislate" in appropriation acts. E.g., Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied, 441 U.S. 952; Friends of the

Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171; Eisenberg v. Corning, 179 F.2d 275 (D.C. Cir. 1949); Tayloe v. Kjaer, 171 F.2d 343 (D.C. Cir. 1948). See also the Dickerson, Cella, and Thompson Products cases cited above in Section B.4, and the discussion of the congressional power of the purse in Chapter 1, Section B. It may well be that the device is "unusual and frowned upon.'" Preterm, 591 F.2d at 131. It also may well be that the appropriation act will be narrowly construed when it is in apparent conflict with authorizing legislation. Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1558 (D.C. Cir. 1984). Maybe—although we express no independent judgment—it is even "universally recognized as exceedingly bad legislative practice. " Tayloe, 171 F.2d at 344. Nevertheless, appropriation acts are, like any other statute, passed by both Houses of Congress and either signed by the President or enacted over a presidential veto. As such, and subject of course to constitutional strictures, they are "just as effective a way to legislate as are ordinary bills relating to a particular subject." Friends of the Earth, 485 F.2d at 9.

(b) Legislative history is not legislation. As useful and important as legislative history may be in resolving ambiguities and determining congressional intent, it is the language of the appropriation act, and not the language of its legislative history, that is enacted into law. As the Supreme Court stated in a case previously cited which we will discuss in more detail later:

"Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress . . . ."

Tennessee Valley Authority v. Hill, 437 U.S. at 191

These, then, are the "guiding principles" which will be applied in various combinations and configurations to analyze and resolve the problem areas identified in the remainder of this section. For the most part, our subsequent discussion will merely note the applicable principle(s). A useful supplemental reference on many of the topics we discuss is Louis Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Cath. U.L. Rev. 51 (1979).

b. Variations in Amount

(1) Appropriation exceeds authorization

Generally speaking, Congress is free to appropriate more money for a given object than the amount previously authorized. As the Comptroller General stated in a brief letter to a Member of Congress:

"While legislation providing for an appropriation of funds in excess of the amount contained in a related authorization act apparently would be subject to a point of order under rule 21 of the Rules of the House of Representatives, there would be no basis on which we could question otherwise proper expenditures of funds actually appropriated. " B-123469, April 14, 1955.

The governing principle was stated as follows in 36 Comp. Gen. 240,242 (1956):

"It is fundamental . that one Congress cannot bind a future Congress and that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money. "

If we are dealing with a line-item appropriation or a specific earmark in a lump-sum appropriation, the quoted statement would appear beyond dispute. However, complications arise where the authorization for a given item is specific and a subsequent lump-sum appropriation includes a higher amount for that item specified only in legislative history and not in the appropriation act itself. in this situation, the rule that one Congress cannot bind a future Congress or later action by the same Congress must be modified somewhat by the rule against repeal by implication. The line of demarcation, however, is not precisely defined.

In 36 Comp. Gen. 240, Congress had authorized the construction of two bridges across the Potomac River "at a cost not to exceed" $7 million. A subsequent appropriation act made a lump-sum appropriation which included funds for the bridge construction (specified in legislative history but not in the appropriation act itself) in excess of the amount authorized. The decision concluded that the appropriation, as the latest expression of Congress on the

matter, was available for expenditure.[44] Similarly, it was held in B-148736, September 15, 1977, that. the National Park Service could expend its lump-sum appropriation for planning and construction of parks even though the expenditures for specific parks would exceed amounts authorized to be appropriated for those parks.

Both of these cases were distinguished in 64 Comp. Gen. 282 (1985), which affirmed a prior unpublished decision, B-214172, July 10, 1984. Authorizing legislation for the Small Business Administration provided specific funding levels for certain SBA programs. SBA's 1984 appropriation act contained a lump-sum appropriation for the programs which, according to the conference report, included amounts in excess of the funding levels specified in the authorization. Relying in part on Tennessee Valley Authority v. Hill, GAO concluded that the two statutes were not in conflict, that the appropriation did not. implicitly repeal or amend the authorizations, and that the spending levels in the authorization were controlling. The two prior cases were distinguished as being limited in scope and dealing with different factual situations. 64 Comp. Gen. at 285. For example, it was clear in the prior cases that Congress was knowingly providing funds in excess of the authorization ceilings. In contrast, the SBA appropriation made explicit reference to the authorizing statute, thus suggesting that Congress did not intend that the appropriation be inconsistent with the authorized spending levels. Id. at 286-87.

(2) Appropriation less than authorization

Congress is free to appropriate less than an amount authorized either in an authorization act or in program legislation, again, as in the case of exceeding an authorization, at least where it does so directly. E.g., 53 Comp. Gen. 695 (1974). This includes the failure to fund a program at all, i.e., not to appropriate any funds. United States v. Dickerson, 310 U.S. 554 (1940).

A more recent case in point is City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977). The Airport and Airway Development Act of 1970 authorized airport development grants "in aggregate amounts not less than" specified dollar amounts for specified fiscal

[44]The decision &, held that obligations in excess of the amount included in the appropriation would violate the Antideficiency Act. Since the appropriation in question was a lump-sum appropriation which did not mention the bridge construction item, this portion of the decision is no longer valid. See Chapter 6, Section F.

years, and provided an apportionment formula. Subsequent appropriation acts included specific limitations on the aggregate amounts to be available for the grants, less than the amounts authorized. The court concluded that both laws could be given effect. by limiting the amounts available to those specified in the appropriation acts, but requiring that they be distributed in accordance with the formula of the authorizing legislation In holding the appropriation limits controlling, the court said:

"According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization. Where Congress chooses to do so, however. we are bound to follow Congress's last word on the matter even in an appropriations law." Id. at 48-49.

Where the amount. authorized to be appropriated is mandatory rather than discretionary, Congress can still appropriate less, or can suspend or repeal the authorizing legislation, as long as the intent to suspend or repeal the authorization is clear. The power is considerably diminished, however, with respect to entitlements that have already vested. The distinction is made clear in the following passage from the Supreme Court's decision in United States v. Larionoff, 431 U.S. 864, 879 (1977):

"NO one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light."

Several earlier cases provide concrete illustrations of what Congress can and cannot do in an appropriation act to reduce or eliminate a non-vested mandatory authorization. In United States v. Fisher, 109 U.S. 143 (1883), permanent legislation set the salaries of certain territorial judges. Congress subsequently appropriated a lesser amount, "in full compensation" for that particular year. The Court held that Congress had the power to reduce the salaries, and had effectively done so. "It is impossible that both acts should stand. No ingenuity can reconcile them. The later act must therefore prevail . . . ." Id. at 146. See also United States v. Mitchell, 109 U.S. 146 (1883). In the Dickerson case cited above, the Court found a mandatory authorization effectively suspended by a provision in an appropriation act prohibiting the use of funds for the payment

in question "notwithstanding the applicable portions of" the authorizing legislation.

In the cases in the preceding paragraph, the "reduction by appropriation" was effective because the intent of the congressional action was unmistakable. The mere failure to appropriate sufficient funds is not enough. In United States v. Langston, 118 U.S. 389 (1886), for example, the Court refused to find a repeal by implication in "subsequent enactments which merely appropriated a less amount. . . and which contained no words that expressly or by clear implication modified or repealed the previous law." Id. at 394. A similar holding is United States v. Vulte, 233 U.S. 509 (1914). A failure to appropriate in this type of situation will prevent administrative agencies from making payment, but, as in Langston and Vulte, is unlikely to prevent recovery by way of a lawsuit. See also New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966); Gibney v. United States, 114 Ct. Cl. 38 (1949).

Thus, appropriating less than the amount of a non-vested mandatory authorization, including not appropriating any funds for it, will be effective under the "last in time" rule as long as the intent to suspend or repeal the authorization is clear, However, by virtue of the rule against repeal by implication, a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation.

(3) Earmarks in authorization act

In Chapter 6, Section B, we set forth the various types of language Congress uses in appropriation acts when it wants to "earmark" a portion of a lump-sum appropriation as either a maximum or a minimum to be spent on some particular object. These same types of earmarking language can be used in authorization acts.

A number of cases have considered the question of whether there is a conflict when an authorization establishes a minimum earmark ("not less than," "shall be available only"), and the related appropriation is a lump-sum appropriation which does not expressly mention the earmark. Is the agency in this situation required to observe the earmark? Applying the principle that an appropriation must be expended in accordance with the related authorization unless the appropriation act provides otherwise, GAO has concluded that the agency must observe the earmark. 64 Comp. Gen. 388

(1985); B-220682, February 21, 1986 ("an earmark in an authorization act must be followed where a lump sum is appropriated pursuant to the authorization"); B-207343, August 18, 1982; B-193282, December 21, 1978. See also B-131935, March 17, 1986. This result applies even though following the earmark will drastically reduce the amount of funds available for non-earmarked programs funded under the same appropriation. 64 Comp. Gen. at 391. (These cases can also be viewed as another application of the rule against repeal by implication.)

If Congress expressly appropriates an amount at variance with a previously-enacted authorization earmark, the appropriation will control under the "last in time" rule. For example, in 53 Comp. Gen. 695 (1974), an authorization act had expressly earmarked $18 million for UNICEF for specific fiscal years. A subsequent. appropriation act provided a lump sum, out of which only $15 million was earmarked for UNICEF. The Comptroller General concluded that the $15 million specified in the appropriation act was controlling and represented the maximum available for UNICEF for that fiscal year.

c. Variations in Purpose

As noted previously, it is only the appropriation, and not the authorization by itself, that permits the incurring of obligations and the making of expenditures. It follows that an authorization does not, as a general proposition, expand the scope of availability of appropriations beyond what is permissible under the terms of the appropriation act. The authorized purpose must be implemented either by a specific appropriation or by inclusion in a broader lump-sum appropriation. Thus, an appropriation made for specific purposes is not available for related but more extended purposes contained in the authorization act but. not included in the appropriation. 19 Comp. Gen. 961 (1940). See also 37 Comp. Gen. 732 (1958); 35 Comp. Gen. 306 (1955); 26 Comp. Gen. 452 (1947).

In addition to simply failing to appropriate funds for an authorized purpose, Congress can expressly restrict the use of an appropriation for a purpose or purposes included in the authorization. E.g., B-24341, April 1, 1942 ("[Whatever may have been the intention of the original enabling act it must give way to the express provisions of the later act which appropriated funds but limited their USC").

Similarly, by express provision in an appropriation act., Congress can expand authorized purposes. In 67 Comp. Gen. 401 (1988), for

example, an appropriation expressly included two mandatory earmarks for projects beyond the scope of the related authorization. Noting that "the appropriation language provides its own expanded authorization for these programs," GAO concluded that the agency was required to reserve funds for the two mandatory earmarks before committing the balance of the appropriation for discretionary expenditures,

Except to the extent Congress expressly expands or limits authorized purposes in the appropriation act, the appropriation must be used in accordance with the authorization act in terms of purpose. Thus, in B-125404, August 31, 1956, it was held that an appropriation to construct a bridge across the Potomac River pursuant to a statute authorizing construction of the bridge and prescribing its location was not available to construct the bridge at a slightly different location even though the planners favored the alternate location. Similarly in B-193307, February 6, 1979, the Flood Control Act of 1970 authorized construction of a dam and reservoir for the Ellicott Creek project in New York. Subsequently, legislation was proposed to authorize channel construction instead of the dam and reservoir, but was not enacted. A continuing resolution made a lump-sum appropriation for flood control projects "authorized by law. " The Comptroller General found that the appropriation did not repeal the prior authorization, and that therefore the funds could not properly be used for the alternative channel construction.

d. Period of Availability

An authorization of appropriations, like an appropriation itself, can be made on a multiple-year or no-year, as well as fiscal year, basis. The question we address here is the extent to which the period of availability specified in an authorization or enabling act is controlling.

Congress can, in an appropriation act, expand the period of availability beyond that specified in the authorization, but it. must do so explicitly. The action must be explicit because of (1) the rule against repeals by implication, (2) the presumption that every appropriation in an annual appropriation act is a one-year appropriation, and (3) the prohibition in 31 U.S.C. §1301(c) against construing an appropriation to be permanent or available continuously unless the appropriation act expressly so states.

Thus, an appropriation of funds "to remain available until expended" (no-year) was found controlling over a provision in the

authorizing legislation which authorized appropriations on a two-year basis. B-182101, October 16, 1974. See also B-149372/B-158195, April 29, 1969 (two-year appropriation of Presidential transition funds held controlling notwithstanding provision in Presidential Transition Act of 1963 which authorized services and facilities to former President and Vice-President only for six months after expiration of term of office).

A 1982 decision, 61 Comp. Gen. 532, included an additional complication. An authorization act had authorized funds to be appropriated for a particular project "for fiscal year 1978." The FY 1978 funds for that project were included in a larger lump sum appropriated "as authorized by law, to remain available until expended." GAO reconciled the two statutes by finding the appropriation to be a no-year appropriation, except to the extent the related authorization specified a lesser period of availability. Thus, funds for the project in question from the lump-sum appropriation were available for obligation only during fiscal year 1978.

Clearly, Congress can also reduce the period of availability from that specified in the authorization act. Indeed, express language in the appropriation itself is not needed to reduce the period of availability to the fiscal year covered by the appropriation act.

In the first group of cases to consider this issue, the crucial test was whether the appropriation language specifically referred to the authorization. If it did, then GAO considered the provisions of the authorization act—including any multiple-year or no-year authorizations—to be incorporated by reference into the provisions of the appropriation act. This was regarded as sufficient to satisfy 31 U.S.C. §1301(c) and to overcome the presumption of fiscal year availability derived from the enacting clause. If the appropriation language did not specifically refer to the authorization act, the appropriation was held to be available only for the fiscal year covered by the appropriation act. 45 Comp. Gen. 508 (1966); 45 Comp. Gen. 236 (1965); B-147196, April 5, 1965; B-127518, May 10, 1956; B-37398, October 26, 1943, The reference had to be specific; the phrase "as authorized by law" was not enough. B-127518, May 10, 1956.

The House Committee on Appropriations considered the issue in connection with the 1964 foreign aid appropriations bill. In its report on that bill, the Committee first described existing practice:

"The custom and practice of the Committee on Appropriations has been to recommend appropriations on an annual basis unless there is some valid reason to make the item available for longer than a one-year period. The most common technique in the latter instances is to add the words 'to remain available until expended' to the appropriation paragraph.

"In numerous instances, ., . the Congress has in the underlying enabling legislation authorized appropriations therefor to be made on an 'available until expended' basis. When he submits the budget, the President generally includes the phrase 'to remain available until expended' in the proposed appropriation language if that is what the Executive wishes to propose. The Committee either concurs or drops the phrase from the appropriation language. "

H.R. Rep. No. 1040, 88th Cong., 1st Sess. 55 (1963). The Committee then noted a situation in the 1963 appropriation which had apparently generated some disagreement. The President had requested certain refugee assistance funds to remain available until expended. The report goes on to state:

"The Committee thought the funds should be on a l-year basis, thus the phrase 'to remain available until expended' was not. in the bill as reported. The final law also failed to include the phrase or any other express language of similar import. Thus Congress took affirmative action to limit the availability to the fiscal year 1963 only'. " Id. at 56.

The Committee then quoted what is now 31 U.S.C. §1301(c), and stated:

"The above quoted 31 U.S.C. [§1301(c)] seems clearly to govern and, in respect to the instant class of appropriation, to require the act making the appropriation to expressly provide for availability longer than 1 year if the enacting clause limiting the appropriations in the law to a given fiscal year is to be overcome as to any specific appropriation therein made. And it accords with the rule of reason and ancient practice to retain control of such an elementary matter wholly within the terms of the law making the appropriation. The two hang together. But in view of the question in the present. case and the possibility of similar questions in a number of others, consideration may have to be given to revising the provisions of 31 U.S.C. [§1301(c)] to make its scope and meaning crystal clear and perhaps update it as may otherwise appear desirable. " Id. (Emphasis in original.)

Section 1301(c) was not amended, but soon after the above discussion appeared, appropriation acts started including a general provision stating that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein. " This added another

ingredient to the recipe which had not been present in the earlier decisions, although it took several years before the new general provision began appearing in almost all appropriation acts.

When the issue arose again in a 1971 case, GAO considered the new appropriation act provision and the 1963 comments of the House Appropriations Committee. As a result of these developments, the rule was changed. Now, if an appropriation act contains the provision quoted in the preceding paragraph, it will not be sufficient for an appropriation contained in that act to merely incorporate a multiple-year or no-year authorization by reference. The effect of this general provision is to require the appropriation language to expressly provide for availability beyond one year in order to overcome the enacting clause. 50 Comp. Gen. 857 (1971). In that decision, GAO noted that "it seems evident that the purpose [of the new general provision] is to overcome the effect of our decisions . . . regarding the requirements of 31 U.S.C. [§ 1301(c)]," and further noted the apparent link between the discussion in House Report 1040 and the appearance of the new provision. Id. at 859. See also 58 Comp. Gen. 321 (1979) and B-207792, August 24, 1982. Thus, the appropriation act will have to expressly repeat the multiple-year or no-year language of the authorization, or at least expressly refer to the specific section of the authorizing statute in which it appears.

Changes in the law from year to year may produce additional complications. For example, the National Historic Preservation Act (authorization) provided that funds appropriated and apportioned to states would remain available for obligation for three fiscal years, after which time any unobligated balances would be reapportioned. This amounted to a no-year authorization. For several years, appropriations to fund the program were made on a no-year basis, thus permitting implementation of the authorization provision. Starting with FY 1978, however, the appropriation act was changed and the funds were made available for two fiscal years. This raised the question of whether the appropriation act had the effect of overriding the apparently conflicting authorizing language, or if it meant merely that reapportionment could occur after two fiscal years instead of three, thus effectively remaining a no-year appropriation.

GAO concluded that the literal language and plain meaning of the appropriation act must govern. In addition to the explicit appropriation language, the appropriation acts contained the general provision restricting availability to the current fiscal year unless expressly provided otherwise therein. Therefore, any funds not obligated by the end of the two-year period would expire and could not be reapportioned. B-151087, September 15, 1981; B-151087, February 17, 1982.

For purposes of the rule of 50 Comp. Gen. 857 and its progeny, it makes no difference whether the authorization is in an annual appropriations authorization act or in permanent enabling legislation. It also appears to make no difference whether the authorization merely authorizes the longer period of availability or directs it. See, for example, 58 Comp. Gen. 321 (1979), in which the general provision restricting availability to the current fiscal year, as the later expression of congressional intent, was held to override 25 U.S.C. §13a, which provides that the unobligated balances of certain Indian assistance appropriations "shall remain available for obligation and expenditure" for a second fiscal year. Similarly, in Dabney v. Reagan, No. 82 Civ. 2231-CSH (S. D.N.Y. March 21, 1985), 1985 WL 443, the court held that a 2-year period of availability specified in appropriation acts would override a "mandatory" no-year authorization contained in the Solar Energy and Energy Conservation Bank Act.

e. Authorization Enacted After Appropriation

Our discussion thus far has, for the most part, been in the context of the normal sequence—that is, the authorization act is passed before the appropriation act. Sometimes, however, consideration of the authorization act is delayed and it is not enacted until after the appropriation act. Determining the relationship between the two acts involves application of the same general principles we have been applying when the acts are enacted in the normal sequence.

The first step is to attempt to construe the statutes together in some reasonable fashion. To the extent this can be done, there is no real conflict, and the reversed sequence will in many cases make no difference. Earlier, for example, we discussed the rule that a specific earmark in an authorization act must be followed when the related appropriation is an unspecified lump sum. In two of the cases cited for that proposition—B-220682, February 21, 1986, and B-193282, December 21, 1978—the appropriation act had been

enacted prior to the authorization, a factor which did not affect the outcome.

In B-193282, for example, the 1979 Justice Department authorization act authorized a lump-sum appropriation to the Immigration and Naturalization Service and provided that $2 million "shall be available" for the investigation and prosecution of certain cases involving alleged Nazi war criminals. The 1979 appropriation act made a lump-sum appropriation to the INS but contained no specific mention of the Nazi war criminal item. The appropriation act was enacted on October 10, 1978, but the authorization act was not enacted until November. In response to a question as to the effect of the authorization provision on the appropriation, the Comptroller General advised that the two statutes could be construed harmoniously, and that the $2 million earmarked in the authorization act could be spent only for the purpose specified. It was further noted that the $2 million represented a minimum but not a maximum. B-193282, December 21, 1978, amplified by B-193282, January 25, 1979. This is the same result that would have been reached if the normal sequence had been followed.

Similarly, in B-226389, November 14, 1988, a provision in the 1987 Defense Appropriation Act prohibited the Navy from including certain provisions in ship maintenance contracts. The 1987 authorization act, enacted after the appropriation, amended a provision in title 10 of the United States Code to require the prohibited provisions. Application of the "last in time" rule would have negated the appropriation act provision. However, it was possible to give effect to both provisions by construing the appropriation restriction as a temporary exemption from the permanent legislation in the authorization act. Again, this is the same result. that would have been reached if the authorization act were enacted first.

If the authorization and appropriation cannot be reasonably reconciled, the "last in time" rule will apply just as it would under the normal sequence, except here the result will be different because the authorization is the later of the two. A 1989 case will illustrate. The 1989 Treasury Department appropriation act contained a provision prohibiting the placing of certain components of the Department under the oversight of the Treasury Inspector General. A month later, Congress enacted legislation placing those components under the Inspector General's jurisdiction and transferring their internal audit staffs to the Inspector General "notwithstanding any

other provision of law." But for the "notwithstanding" clause, it might have been possible to use the same approach as in B-226389 and find the appropriation restriction a temporary exemption from the new permanent legislation. In view of that clause, however, GAO found that the two provisions could not be reconciled, and concluded that the Inspector General legislation, as the later enactment, superseded the appropriation act provision. B-203900, February 2, 1989.

Just as with any other application of the "last in time" rule, the later enactment prevails only to the extent of the irreconcilable conflict. B-61 178, October 21, 1946 (specific limitations in appropriation act not superseded by after-enacted authorization absent indication that authorization was intended to alter provisions of prior appropriation).

Sometimes, application of the standard principles fails to produce a simple answer. For example, Congress appropriated $75 million for FY 1979 for urban formula grants "as authorized by the Urban Mass Transportation Act of 1964, " When the appropriation was enacted, legislation was pending—and was enacted three months after the appropriation—repealing the existing formula and replacing it with a new and somewhat broader formula. The new formula provision specified that it was to be applicable to "sums appropriated pursuant to subparagraph (b) of this paragraph. " On the one hand, since the original formula had been repealed, it could no longer control the use of the appropriation. Yet on the other hand, funds appropriated three months prior to passage of the new formula could not be said to have been appropriated "pursuant to" the new act. Hence, neither formula was clearly applicable to the $75 million. The Comptroller General concluded that the $75 million earmarked for the grant program had to be honored, and that. it should be distributed in accordance with those portions of the new formula that were "consistent with the terms of the appropriation," that is, the funds should be used in accordance with those elements of the new formula that had also been reflected in the original formula. B-175155, July 25, 1979.

f. Two Statutes Enacted on Same Day

The Supreme Court has said that the doctrine against repeal by implication is even more forceful "where the one Act follows close upon the other, at the same session of the legislature." Morf v. Bingaman, 298 U.S. 407,414 (1936). This being the case, the doctrine reaches perhaps its strongest point., and the "last in time" rule is

correspondingly at its weakest, when both statutes are enacted on the same day. Except in the very rare case in which the intent of one statute to affect the other is particularly manifest, it makes little sense to apply a "last in time" concept where the time involved is a matter of hours, or as in one case (B-79243, September 28, 1948), seven minutes. Thus, the starting point is the presumption—applicable in all cases but even stronger in this situation—that Congress intended both statutes to stand together. 67 Comp. Gen. 332,335 (1988); B-204078.2, May 6,1988.

When there is an apparent conflict between an appropriation act and another statute enacted on the same day, the approach is to make every effort to reconcile the statutes so as to give maximum effect to both. In some cases, it will be found that there is no real conflict. In 67 Comp. Gen. 332, for example, one statute authorized certain Commodity Credit Corporation appropriations to be made in the form of current, indefinite appropriations, while the appropriation act, enacted on the same day, made line-item appropriations. There was no conflict because the authorization provision was a directive to the Congress itself which Congress was free to disregard, subject to a possible point of order, when making the actual appropriation. Similarly, there was no inconsistency between an appropriation act provision which required that Panama Canal Commission appropriations be spent only in conformance with the Panama Canal Treaty of 1977 and its implementing legislation, and an authorization act provision, enacted on the same day, requiring prior specific authorizations. B-204078.2, May 6, 1988.

In other cases, applying traditional rules of statutory construction will produce reconciliation. For example, if one statute can be said to be more specific than the other, they can be reconciled by applying the more specific provision first, with the broader statute then applying to any remaining situations. See B-231662, September 1, 1988; B-79243, September 28, 1948.

Legislative history may also help. In B-207186, February 10, 1989, for example, authorizing legislation extended the life of the Solar Bank to March 15, 1988. The 1988 appropriation, enacted on the same day, made a 2-year appropriation for the Bank. Not only were there no indications of any intent for the appropriation to have the effect of extending the Bank's life, there were specific indications to the contrary. Thus, GAO regarded the appropriation as available, in theory for the full 2-year period, except that the authority for

anyone to obligate the appropriation would cease when the Bank went out of existence.

The most extreme situation, and one in which the "last in time" rule by definition cannot possibly apply, is two conflicting provisions in the same statute. Even here, the approaches outlined above will usually prove successful. See, e.g., B-211306, June 6, 1983. We have found only one case, 26 Comp. Dec. 534 (1920), in which two provisions in the same act were found irreconcilable. One provision in an appropriation act appropriated funds to the Army for the purchase of land; another provision a few pages later in the same act expressly prohibited the use of Army appropriations for the purchase of land. The Comptroller of the Treasury concluded, in a very brief decision, that the prohibition nullified the appropriation. The advantage of this result, although not stated this way in the decision, is that Congress would ultimately have to resolve the conflict and it is easier to make expenditures that have been deferred than to recoup money after it has been spent.

g. Ratification by Appropriation

"Ratification by appropriation" is the doctrine by which Congress can, by the appropriation of funds, confer legitimacy on an agency action which was questionable when it was taken. Clearly Congress may ratify that which it could have authorized. Swayne & Hoyt, Ltd. v. United States, 300 US. 297,301-02 (1937). It is also settled that Congress may manifest its ratification by the appropriation of funds. Greene v. McElroy, 360 US. 474, 504-06 (1959); Ex Parte Endo, 323 U.S. 283,303 n.24 (1944); Brooks v. Dewar, 313 U.S. 354, 360-61 (1941).

Having said this, however, we must also emphasize that "ratification by appropriation is not favored and will not be accepted where prior knowledge of the specific disputed action cannot be demonstrated clearly." D.C. Federation of Civic Associations v. Airis, 391 F.2d 478, 482 (D.C.Cir.1968); Associated Electric Cooperative, Inc. v. Morton, 507 F.2d 1167, 1174 (D.C.Cir. 1974), cert. denied, 423 U.S. 830. Thus, a simple lump-sum appropriation, without more, will generally not afford sufficient basis to find a ratification by appropriation. Endo, 323 US. at 303 n.24; Airis, 391 F.2d at 481-82; Wade v. Lewis, 561 F. Supp. 913,944 (N.D. Ill. 1983); B-213771, July 10, 1984. The appropriation "must plainly show a purpose to bestow the precise authority which is claimed." Endo, 323 U.S. at 303 n.24.

Some courts have used language which, when taken out of context, implies that appropriations cannot serve to ratify prior agency action. E.g., Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 35 n.12 (3d Cir. 1976). Nevertheless, while the doctrine may not be favored, it does exist. We turn now to some specific situations in which the doctrine has been accepted or rejected.

Presidential reorganizations have generated perhaps the largest number of cases. Generally, when the President has created a new agency or has transferred a function from one agency to another, and Congress subsequently appropriates funds to the new agency or to the old agency for the new function, the courts have found that the appropriation ratified the Presidential action. Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147 (1937). The transfer to the Equal Employment Opportunity Commission in 1978 of enforcement responsibility for the Age Discrimination in Employment Act and the Equal Pay Act produced a minor flood of litigation. The cases were complicated by the existence of a legislative veto issue, with the ratification issue having to be faced only if the reorganization authority were found severable from the legislative veto. Although the courts were not uniform, a clear majority found that the subsequent appropriation of funds to the EEOC ratified the transfer. EEOC v. Dayton Power & Light Co., 605 F. Supp. 13 (S.D. Ohio 1984); EEOC v. Delaware Dept. of Health & Social Services, 595 F. Supp. 568 (D. Del, 1984); EEOC v. New York, 590 F. Supp. 37 (N. D.N.Y. 1984); EEOC v. Radio Montgomery, Inc., 588 F. Supp. 567 (W.D. Va. 1984); EEOC v. City of Memphis, 581 F. Supp. 179 (W.D. Term. 1983); Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Term. 1983), aff'd on other grounds, 743 F.2d 380 (6th Cir. 1984). Contra, EEOC v. Martin Industries, 581 F. Supp. 1029 (N.D. Ala. 1984), appeal dismissed, 469 U.S. 806; EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983), appeal dismissed, 467 U.S. 1232. Congress resolved any doubt by enacting legislation in 1984, to expressly ratify all prior reorganization plans implemented pursuant to any reorganization statute.[45]

Another group of cases has refused to find ratification by appropriation for proposed construction projects funded under lump-sum appropriations where the effect would be either to expand the

[45]Pub. L. No. 98-532, 98 Stat. 2705 (1984), 5 U.S.C. § 906 note.

scope of a prior congressional authorization or to supply an authorization required by statute but not obtained. Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979); National Wildlife Federation v. Andrus, 440 F. Supp. 1245 (D.D.C. 1977); Atchison, Topeka and Santa Fe Ry. Co. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974); B-223725, June 9, 1987.

A few additional cases in which ratification by appropriation was found are summarized below:

. The Tennessee Valley Authority had asserted the authority to construct power plants. TVA's position was based on an interpretation of its enabling legislation which the court found consistent with the purpose of the legislation although the legislation itself was ambiguous. The appropriation of funds to TVA for power plant construction ratified TVA's position. Young v. TVA, 606 F.2d 143 (6th Cir. 1979), cert. denied, 445 U.S. 942.

- The authority of the Postmaster General to conduct a mail transportation experiment was ratified by the appropriation of funds to the former Post Office Department under circumstances showing that Congress was fully aware of the experiment. The court noted that existing statutory authority was broad enough to encompass the experiment, and nothing prohibited it. Atchison, Topeka and Santa Fe Ry. Co. v. Summerfield, 229 F.2d 777 (D.C. Cir. 1955), cert. denied, 351 U.S. 926.
- The authority of the Department of Justice to retain private counsel to defend federal officials in limited circumstances, while not explicitly provided by statute, is regarded as ratified by the specific appropriation of funds for that purpose. 2 Op. Off. Legal Counsel 66 (1978).

Note that in all of the cases in which ratification by appropriation was approved, the agency had at least an arguable legal basis for its action. See also Airis, 391 F.2d at 481 n.20; B-232482, June 4, 1990. The doctrine has not been used to excuse violations of law. Also, when an agency action is constitutionally suspect, the courts will require that congressional action be particularly explicit. Greene v. McElroy, 360 U.S. at 506-07; EEOC v. Martin Industries, 581 F. Supp. at 1033-37; Muller Optical Co. v. EEOC, 574 F. Supp. at 954.

h. Repeal by Implication

We have on several occasions referred to the rule against repeal by implication. The leading case in the appropriations context is Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). In that case, Congress had authorized construction of the Tellico Dam and Reservoir Project on the Little Tennessee River, and had appropriated initial funds for that purpose. Subsequently, Congress passed the Endangered Species Act of 1973. Under the provisions of that Act, the Secretary of the Interior declared the "snail darter," a three-inch fish, to be an endangered species. It was eventually determined that the Little Tennessee River was the snail darter's critical habitat and that completion of the dam would result in extinction of the species. Consequently, environmental groups and others brought an action to halt further construction of the Tellico Project. In its decision, the Supreme Court held in favor of the plaintiffs, notwithstanding the fact that construction was well under way and that, even after the Secretary of the Interior's actions regarding the snail darter, Congress had continued to make yearly appropriations for the completion of the dam project.

The appropriation involved was a lump-sum appropriation which included funds for the Tellico Dam but made no specific reference to it. However, passages in the reports of the appropriations committees indicated that those committees intended the funds to be available notwithstanding the Endangered Species Act. The Court held that this was not enough. The doctrine against repeal by implication, the Court said, applies with even greater force when the claimed repeal rests solely on an appropriation act.

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden."

Id. at 190. Noting that "[expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress" (id. at 191), the Court held that the unspecified inclusion of the Tellico Dam funds in a lump-sum appropriation was not sufficient to constitute a repeal by implication of the Endangered Species Act insofar as it related to that project.[46] In other words, the doctrine of ratification by appropriation we discussed in the preceding section does not apply, at least when the

[46] Less than four months after the Court's decision, Congress enacted legislation exempting the Tellico project from the Endangered Species Act. Endangered Species Act Amendments of 1978, Pub. L. No, 95-632,55,92 Stat. 3751,3761 (1978).

appropriation is an otherwise unspecified lump sum, where the effect would be to change an existing statutory requirement.

TVA v. Hill is important because it is a clear and forceful statement from the Supreme Court, In terms of the legal principle involved, however, the Court was breaking little new ground. A body of case law from the lower courts had already laid the legal foundation. One group of cases, for example, had established the proposition that the appropriation of funds does not excuse non-compliance with the National Environmental Policy Act. Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); National-Audubon-Society v. Andrus, 442 F. Supp. 42 (D.D.C. 1977); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971). Cases supporting the general proposition of TVA v. Hill in other contexts were also not uncommon. See Associated Electric Cooperative, Inc. v. Morton, 507 F.2d 1167 (D.C. Cir. 1974), cert. denied, 423 U.S. 830; D.C. Federation of Civic Associations v. Airis, 391 F.2d 478 (D.C. Cir. 1968); and Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

Some subsequent cases applying the concept of TVA v. Hill (although not all citing that case) include Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984); 64 Comp. Gen. 282 (1985); B-208593.6, December 22, 1988; B-213771, July 10, 1984; B-204874, July 28, 1982; and B-193307, February 6, 1979, In B-204874, for example, the Comptroller General advised that the otherwise unrestricted appropriation of coal trespass receipts to the Bureau of Land Management did not implicitly amend or repeal the provisions of the Federal Land Policy and Management Act prescribing the use of such funds.

In reading the cases, one will encounter the occasional sweeping statement such as "appropriations acts cannot change existing law," National Audubon Society v. Andrus, 442 F. Supp. at 45. Such statements can be misleading, and should be read in the context of the facts of the particular case. It is clear from TVA v. Hill, together with its ancestors and its progeny, that Congress cannot legislate by legislative history. It seems equally clear that the appropriation of funds, without more, is not sufficient to overcome a statutory requirement. If, however, instead of an unrestricted lump sum, the

appropriation in Hill had provided a specific line-item appropriation for the Tellico project, together with the words "notwithstanding the provisions of the Endangered Species Act," it is difficult to see how a court could fail to give effect to the express mandate of the appropriation.

Thus, the message is not that Congress cannot legislate in an appropriation act, It can, and we have previously cited a body of case law to that effect. The real message is that, if Congress wants to use an appropriation act as the vehicle for suspending, modifying, or repealing a provision of existing law, it must do so advisedly, speaking directly and explicitly to the issue.

i. Lack of Authorization

As we have previously noted, there is no general statutory requirement that appropriations be preceded by specific authorizations, although they are required in some instances. Where authorizations are not required by law, Congress may, subject to a possible point of order, appropriate funds for a program or object which has not been previously authorized or which exceeds the scope of a prior authorization, in which event the enacted appropriation, in effect, carries its own authorization and is available to the agency for obligation and expenditure. E.g., 67 Comp. Gen. 401 (1988); B-219727, July 30, 1985; B-173832, August 1, 1975.

It has also been held that, as a general proposition, the appropriation of funds for a program whose funding authorization has expired, or is due to expire during the period of availability of the appropriation, provides sufficient legal basis to continue the program during that period of availability, absent indication of contrary congressional intent. 65 Comp. Gen. 524 (1986); 65 Comp. Gen. 318,320-21 (1986); 55 Comp. Gen. 289 (1975); B-131935, March 17, 1986; B-137063, March 21, 1966. The result in these cases follows in part from the fact that the total absence of appropriations authorization legislation would not have precluded the making of valid appropriations for the programs. E.g., B-202992, May 15, 1981. In addition, as noted, the result is premised on the conclusion, derived either from legislative history or at least the absence of legislative history to the contrary, that Congress did not intend for the programs to terminate.

There are limits on how far this principle can be taken, depending on the particular circumstances. One illustration is B-207186, February 10, 1989. A 1988 continuing resolution provided funds for

the Solar Bank, to remain available until September 30, 1989. Legislation enacted on the same day provided for the Bank to terminate on March 15, 1988. Based in part on legislative history indicating the intent to terminate the Bank on the specified sunset date, GAO distinguished prior decisions in which appropriations were found to authorize program continuation, and concluded that the appropriation did not authorize continuation of the Solar Bank beyond March 15, 1988.

A device Congress has used on occasion to avoid this type of problem is an "automatic extension" provision, under which funding authorization is automatically extended for a specified time period if Congress has not enacted new authorizing legislation before it expires. An example is discussed in B-214456, May 14, 1984,

Questions concerning the effect of appropriations on expired or about-to-expire authorizations have tended to arise more frequently in the context of continuing resolutions. The topic is discussed further, including several of the cases cited above, in Chapter 8.

Where specific authorization is statutorily required, the case may become more difficult. In Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979), the court held that a lump-sum appropriation available for dam construction was not, by itself, sufficient to authorize a construction project for which specific authorization had not been obtained as required by 33 USC. § 401. The court suggested that TVA v. Hill and similar cases do not "mandate the conclusion that courts can never construe appropriations as congressional authorization," although it was not necessary to further address that issue in view of the specific requirement in that case. Poteat, 594 F.2d at 745-46. The result would presumably have been different if Congress had made a specific appropriation "notwithstanding the provisions of 33 U.S.C. § 401." It should be apparent that the doctrines of repeal by implication and ratification by appropriation are relevant in analyzing issues of this type.

D. Statutory Interpretation: Determining Congressional Intent

"[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute. " Greenwood v. United States, 350 U.S. 366,374 (1956) (Frankfurter, J.).

1. The Goal of Statutory Construction

As we have noted elsewhere, an appropriation can be made only by means of a statute. In addition to providing funds, the typical appropriation act includes a variety of general provisions. Anyone who works with appropriations matters will also have frequent need to consult authorizing and program legislation. It should thus be apparent that the interpretation of statutes is of critical importance to appropriations law.[48]

The objective of this section is to provide a brief overview, designed primarily for those who do not work extensively with legislative materials. The cases we cite are but a sampling, selected for illustrative purposes or for a particularly good judicial statement of a point. The literature in the area is voluminous, and readers who need more than we can provide are encouraged to consult one of the established treatises such as Sutherland's Statutes and Statutory Construction.

The goal of statutory construction is simply stated: to determine and give effect to the intent of the enacting legislature. Philbrook v. Glodgett, 421 U.S. 707,713 (1975); United States v. American Trucking Associations, Inc., 310 U.S. 534,542 (1940); 55 Comp. Gen. 307,317 (1975); 38 Comp. Gen. 229 (1958). While the goal may be simple, the means of achieving it are complex and often controversial. The primary vehicle for determining legislative intent is the language of the statute itself. When this does not suffice, there is an established body of principles, centering primarily on the use of legislative history, to aid in the effort.

[47] There is a technical distinction between "interpretation" (determining the meaning of words) and "construction" (application of words to facts). 2A Sutherland, Statutes and Statutory Construction § 45.04 (4th ed. 1984). The distinction, as Sutherland points out, has little practical value. We, as does Sutherland, use the terms interchangeably.

[48] "But if Congress has all the money of the United States under its control, it also has the whole English language to give it away with . . . ." 9 Op. Att'y Gem 57, 59 (1857).

At this point, it is important to recognize that the concept of "legislative intent" is in many cases a fiction. Where not clear from the statutory language itself, it is often impossible to ascribe art intent to Congress as a whole.[49] As we will note later, a committee report represents the views of that committee. Statements by an individual legislator represent the views of that individual. Either may, but do not necessarily or inherently, reflect a broader congressional perception. For this reason, the use of legislative history to determine congressional intent has come under increased criticism. To say this, however, is by no means to denigrate the process. Applying the complex maze of rules and "canons of construction," imperfect as the process may be, serves the essential purpose of providing a common basis for problem-solving.

This in turn is important for two reasons. First, everyone has surely heard the familiar statement that our government is a government of laws and not of men.[50] This means that you have a right to have your conduct governed and judged in accordance with identifiable principles and standards, not by the whim of the decision-maker. Second, the law should be reasonably predictable. A lawyer's advice that a proposed action is or is not permissible amounts to a reasoned and informed judgment as to what a court is likely to do if the action is challenged. While this can never be an absolute guarantee, it once again must be based on identifiable principles and standards. Conceding its weaknesses, the law of statutory construction represents an organized approach for doing this.

2. The "Plain Meaning" Rule

"The Court's task is to construe not English but congressional English. " Commissioner v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

By far the most important rule of statutory construction is this: You start with the language of the statute. Mallard v. United States District Court, 490 U.S. 296,300 (1989). The primary vehicle for Congress to express its intent is the words it enacts into law. As stated in an early Supreme Court decision:

[49] E.g., United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290,318 (1897): "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act."

[50] " The government of the United States has been emphatically termed a government of laws, and not of men." Marbury v. Madison, 5 US (1 Cranch) 137, 163 (1803).

"The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used . . ."

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). A somewhat better-known statement is from United States v. American Trucking Associations, 310 U.S. at 543:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

If the meaning is clear from the language of the statute, there is no need to resort to legislative history or any other extraneous source. This is the so-called "plain meaning" rule. If the meaning is "plain," you apply that meaning and that's the end of the inquiry. E.g., Mallard v. District Court, 490 U.S. 296; United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989); Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 (1983); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564,570 (1982); TVA v. Hill, 437 U.S. 153, 184 n.29 (1978); Ex parte Collett, 337 U.S. 55, 61 (1949); Caminetti v. United States, 242 U.S. 470, 485, 490 (1917); 56 Comp. Gen. 943 (1977); B-230656, April 4, 1988. In Mallard, for example, the Supreme Court held that a court may not require an unwilling attorney to represent an indigent litigant under a statute providing that a court "may request an attorney to represent" indigents in civil cases. "Request" simply does not mean "require."

One common-sense way to determine the plain meaning of a word is to consult a dictionary. E.g., Mallard, 490 U.S. at 301; American Mining Congress v. EPA, 824 F.2d 1177, 1183-84& n.7 (D.C. Cir. 1987). As a perusal of any dictionary will show, words often have more than one meaning. [51] The "plain meaning" will be the ordinary, everyday meaning rather than some obscure usage. E.g., Mallard, 490 US. at 301; 38 Comp. Gen. 812 (1959). If a word has more than one ordinary meaning and the context of the statute does not make it clear which is being used, there may well be no "plain meaning" for purposes of that statute.

[51] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

The converse of the plain meaning rule is that it is legitimate and proper to resort to legislative history when the meaning of the statutory language is not plain on its face, Again, we start with an early Supreme Court passage, this one a famous statement by Chief Justice John Marshall:

"Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ."

United States v. Fisher, 6 U.S. (2 Cranch) 358,386 (1805). See also United States v. Donruss Co., 393 U.S. 297,302-03 (1969); Caminetti, 242 U.S. at 490 (legislative history "may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation").

Like all "rules" of statutory construction, the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Boston Sand and Gravel Co. v. United States, 278 U.S. 41,48 (1928) (Holmes, J.), quoted in Watt v. Alaska, 451 U.S. 259,266 (1981). In another often-quoted statement, the Court said:

"When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" [footnotes omitted].

United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-44 (1940), quoted in, for example, Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976).

Thus, it is generally accepted that the literal language of a statute will not be followed if it would produce a result demonstrably inconsistent with clearly expressed congressional intent. The case probably most frequently cited for this proposition is Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), which gives several interesting examples. One of those examples is United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868), in which the Court held that a statute making it a criminal offense to knowingly and wilfully obstruct or retard a driver or carrier of the mails did not apply to a sheriff arresting a mail carrier who had been indicted for murder. Another is an old English ruling that a statute making it a felony to break out of jail did not apply to a prisoner who broke out because the jail was on fire. Holy Trinity, 143 U.S. at 460-61. An example

from early administrative decisions might be 24 Comp. Dec. 775 (1918), holding that an appropriation for "messenger boys" was available to hire "messenger girls."[52] See also "Errors in Statutes" later in this chapter.

In cases subsequent to Holy Trinity, the Court has emphasized that departures from the plain meaning rule are justified only in "rare and exceptional circumstances," such as the illustrations used in Holy Trinity. Crooks v. Harrelson, 282 U.S. 55, 60 (1930). See also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235,242 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564,571 (1982); TVA v. Hill, 437 U.S. 153, 187 n.33 (1978) (citing Crooks v. Harrelson with approval).

The exception to the plain meaning rule is also sometimes phrased in terms of avoiding "absurd consequences. " E.g., United States v. Ryan, 284 U.S. 167, 175 (1931). As the dissenting opinion in TVA v. Hill points out (437 U.S. at 204 n.14), there is a bit of confusion in this respect in that Crooks—again, cited with approval by the majority in TVA v. Hill—explicitly states that avoiding absurd consequences is not enough, although the Court has used the "absurd consequence" formulation in post-Crooks cases such as Ryan. In any event, as a comparison of the majority and dissenting opinions in TVA v. Hill will demonstrate, the "absurd consequences" test is not always easy to apply in that what strikes one person as absurd may be good law to another.

3. Use of Legislative History

a. Uses and Limitations

The term "legislative history" refers to the body of congressionally-generated written documents relating to a bill from the time of introduction to the time of enactment. Legislative history is always relevant in the sense that it is never "wrong" to look at it. Thus, most cases purporting to apply the plain meaning rule also review legislative history-TVA v. Hill being one good example—if for no other reason than to establish that nothing in that history contradicts the court's view of what the plain meaning is.

[52]The decision had nothing to do with equality of the sexes; the "boys" were all off fighting World War I.

It is entirely proper to use legislative history to seek guidance on the purpose of a statute (to see, for example, what kinds of problems Congress wanted to address), or to confirm the apparent plain meaning, or to resolve ambiguities. A classic example of the latter is a statute using the words "science" or "scientific." Either term, without more, does not tell you whether the statute applies to the social sciences as well as the physical sciences. E.g., American Kennel Club, Inc. v. Hoey, 148 F.2d 920,922 (2d Cir. 1945); B-181142, August 5, 1974 (GAO recommended term "science and technology" in a bill be defined to avoid this ambiguity). If the statute does not include a definition, you would look next to the legislative history.

The use becomes improper when the line is crossed from using legislative history to resolve things that are not clear from the statutory language to using it to rewrite the statute. The Comptroller General put it this way:

> "[A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there. "

55 Comp. Gen. 307,325 (1975). To pursue this thought with our "science" example, if a statute authorizing grants for scientific research explicitly defined the term as meaning the physical and biological sciences, grants for research in economics or sociology would not be authorized, notwithstanding any legislative history to the contrary. Or, to take an illustration in a lighter vein, suppose Congress enacted a law to "regulate the feeding of garbage to swine. "[53] One might legitimately ask precisely what Congress intended to include in the term "garbage." If the statute did not include a definition, the legislative history might provide guidance.[54] On the other hand, if someone asked whether the law applied to farm animals other than swine (assuming anyone would consider feeding garbage to other farm animals), the answer would clearly be no, unless specified in the statute itself. One term is inherently ambiguous; the other is plain on its face.

[53]Yes, it exists. It's the Swine Health Protection Act, Pub. L. No. 96-468,94 Stat. 2229 (1980), 7 U.S.C. §§ 3801-3813.

[54]In this case, the statute does define the term. See 7 U.S.C. § 3802(2).

b. Components and Their Relative Weight

Legislative history falls generally into three categories: committee reports, floor debates, and hearings. For probative purposes, they bear an established relationship to one another. Let us emphasize before proceeding, however, that listing items of legislative history in an "order of persuasiveness" is merely a guideline. The evidentiary value of any piece of legislative history depends on its relationship to other available legislative history and, most importantly, to the language of the statute.

(1) Committee reports

The most authoritative single source of legislative history is the conference report. E.g., Squillacote v. United States, 739 F.2d 1208, 1218 (7th Cir. 1984); B-142011, April 30, 1971. This is especially true if the statutory language in question was drafted by the conference committee. The reason the conference report occupies the highest rung on the ladder is that it must be voted on and adopted by both Houses, and thus is the only legislative history document that can be said to reflect the will of both Houses. Commissioner v. Acker, 361 U.S. 87,94 (1959) (Frankfurter, J., dissenting).

Next in sequence are the reports of the legislative committees which considered the bill and reported it out to their respective Houses. The Supreme Court has consistently been willing to rely on committee reports when otherwise appropriate. E.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443,474 (1921); United States v. St. Paul, Minneapolis& Manitoba Ry. Co., 247 U.S. 310, 318 (1918); Lapina v. Williams, 232 U.S. 78,90 (1914).

However, material in committee reports, even a conference report, will ordinarily not be used to controvert clear statutory language. Squillacote, 739 F.2d at 1218; Hart v. United States, 585 F.2d 1025 (Ct. Cl. 1978); B-33911/B-62187, July 15, 1948.

Committee reports, as with all legislative history, must be used with caution. The following two passages reflect recent criticism of excessive reliance on committee reports. The first is from the opinion of the Court of Claims in Hart v. United States, 585 F.2d at 1033, quoted in Conlon v. United States, 8 Cl. Ct. 30,33 (1985):

"We note that with the swiftly growing use of the staff system by Congress, many congressional documents may be generated that are not really considered fully by each or perhaps by any legislator. Thus, committee reports and

the like are perhaps less trustworthy sources of congressional intent than they used to be, and less than the actual wording of the legislation, which one would hope received more thorough consideration prior to enactment. If there is inadvertent error either in the statute or in the committee report, the offender is more likely to be the latter, surely. "

The second is an excerpt from a colloquy between Senators Armstrong and Dole which took place on July 19, 1982:

"Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report"?

"Mr. DOLE. No.

"Mr. ARMSTRONG Mr. President, the reason I raise the issue is not perhaps apparent on the surface . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.

. . . .

"1 only wish the record to reflect that. this is not statutory language. It is not before us. If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.

". .[F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute. "[55]

Notwithstanding the imperfections of the system, in those cases where there is a need to resort to legislative history, committee reports remain generally recognized as the best source.

(2) Floor debates

Proceeding downward on the ladder, after committee reports come floor debates. Statements made in the course of floor debates have traditionally been regarded as suspect in that they are "expressive

[55]128 Cong. Rec. 16918-19 (1982), quoted in Hirschey v. Federal Energy Regulatory Commis-~, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

of the views and motives of individual members." Duplex Printing Press Co. v. Deering, 254 U.S. 443,474 (1921). In addition—

"[I]t is impossible to determine with certainty what construction was put. upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other ."

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290,318 (1897). Some of the earlier cases, such as Trans-Missouri Freight, indicate that floor debates should never be taken into consideration. Under the more modern view, however, they may be considered, the real question being the weight they should receive in various circumstances.

Floor debates are less authoritative than committee reports. Garcia v. United States, 469 U.S. 70, 76 (1984); Zuber v. Allen, 396 U.S. 168, 186 (1969); United States v. O'Brien, 391 U.S. 367,385 (1968); United States v. United Automobile Workers, 352 U.S. 567,585 (1957). It follows that they will not be regarded as persuasive if they conflict with explicit statements in more authoritative portions of legislative history such as committee reports. United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942); B-1 14829, June 27, 1975.

Debates will carry considerably more weight when they are the only available legislative history as, for example, in the case of a post-report floor amendment. Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 169-70 (1985); Preterm, Inc. v. Dukakis, 591 F.2d 121, 128 (1st Cir. 1979), cert. denied, 441 U.S. 952. Indeed, the Preterm court suggested that "heated and lengthy debates" in which "the views expressed were those of a wide spectrum" of members might be more valuable in discerning congressional intent than committee reports "which represent merely the views of [the committee's] members and may never have come to the attention of Congress as a whole." Preterm, 591 F.2d at 133.

The weight to be given statements made in floor debates varies with the identity of the speaker. Thus, statements by legislators in charge of a bill, such as the pertinent committee chairperson, have been regarded as "in the nature of a supplementary report" and

receive somewhat more weight. United States v. St. Paul, Minneapolis & Manitoba Ry. Co., 247 U.S. 310, 318 (1918). See also McCaughn v. Hershey Chocolate Co., 283 U.S. 488,493-94 (1931) (statements by Members "who were not in charge of the bill" were "without weight"); Duplex v. Deering, 254 US. at 474-75; National Labor Relations Board v. Thompson Products. Inc., 141 F.2d 794, 798 (9th Cir. 1944). The Supreme Court's statement in St. Paul Ry. Co. gave rise to the entirely legitimate practice of "making" legislative history by preparing questions and answers in advance, to be presented on the floor and answered by the Member in charge of the bill.[56]

Statements by the sponsor of a bill are also entitled to somewhat more weight. E.g., Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384,394-95 (1951); Ex Parte Kawato, 317 U.S. 69,77 (1942). However, they are not controlling. Chrysler Corp. v. Brown, 441 U.S. 281,311 (1979).

Statements by the opponents of a bill expressing their "fears and doubts" generally receive little, if any, weight. Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 19, 29 (1988); Schwegmann, 341 U.S. at 394. However, even the statements of opponents maybe "relevant and useful," although not authoritative, in certain circumstances, such as, for example, where the supporters of a bill make no response to opponents' criticisms. Arizona v. California, 373 US. 546, 583 n.85 (1963); Parlane Sportswear Co. v. Weinberger, 513 F.2d 835,837 (1st Cir. 1975).

Where Senate and House floor debates suggest conflicting interpretations and there is no more authoritative source of legislative history available, it is legitimate to give weight to such factors as which House originated the provision in question and which House has the more detailed and "clear cut" history. Steiner v. Mitchell, 350 U.S. 247,254 (1956); 49 Comp. Gen. 411 (1970).

(3) Hearings

Hearings occupy the bottom rung on the ladder. They are valuable for many reasons: they help define the problem Congress is

[56]The origin and use of this device were explained in a floor statement by former Senator Morse on March 26, 1964. See 110 Cong. Rec. 6423 (1964).

addressing; they present opposing viewpoints for Congress to consider; and they provide the opportunity for public participation in the lawmaking process. As legislative history, however, they are the least persuasive form. The reason is that they reflect only the personal opinion and motives of the witness. It is impossible to attribute these opinions and motives to anyone in Congress, let alone Congress as a whole, unless more authoritative forms of legislative history expressly adopt them. As one court has stated, an isolated excerpt from the statement of a witness at hearings "is not entitled to consideration in determining legislative intent." Pacific Ins. Co. v. United States, 188 F.2d 571, 572 (9th Cir. 1951). "It would indeed be absurd," said another court, "to suppose that the testimony of a witness by itself could be used to interpret an act of Congress." SEC v. Collier, 76 F.2d 939, 941 (2d Cir. 1935).

There is one significant exception. Testimony by the government agency which recommended the bill or amendment in question, and which often helped draft it, is entitled to special weight. Shapiro v. United States, 335 U.S. 1, 12 n.13 (1948); SEC v. Collier, 76 F.2d at 941.

Also, testimony at hearings can be more valuable as legislative history if it can be demonstrated that the language of a bill was revised in direct response to that testimony. Relevant factors include the presence or absence of statements in more authoritative history linking the change to the testimony; the proximity in time of the change to the testimony; and the precise language of the change as compared to what was offered in the testimony. See Premachandra v. Mitts, 753 F.2d 635,640-41 (8th Cir. 1985). See also Allen v. State Board of Elections, 393 US. 544, 566-68 (1969); SEC v. Collier, 76 F.2d at 940,941.

c. Post-Enactment Statements

Observers of the often difficult task of discerning congressional intent occasionally ask, isn't there an easier way to do this? Why don't you just call the sponsor or the committee and ask what they had in mind? The answer is that post-enactment statements have virtually no weight in determining prior congressional intent. The reason is that it is impossible to demonstrate that the substance of a post hoc statement reflects the intent of the pre-enactment Congress, unless it can be corroborated by pre-enactment statements, in which event it would be unnecessary. Or, as the Supreme Court has said:

"Since such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct postenactment polls of the original legislators."

Pittston Coal Group v. Sebben, 488 U.S. 105, 118-19 (1988).

This rule applies regardless of the identity of the speaker (sponsor, committee, committee chairman, etc.) and regardless of the form of the statement (report, floor statement, letter, affidavit, etc.). There are numerous cases in which the courts, and particularly the Supreme Court, have expressed the unwillingness to give weight to post-enactment statements. See, e.g., Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577, 582 n.3 (1982); Quern v. Mandley, 436 U.S. 725,736 n. 10 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968); Haynes v. United States, 390 U.S. 85, 87 n.4 (1968). GAO naturally follows the same principle. E.g., 54 Comp. Gen. 819,822 (1975).

Even post-enactment material may be taken into consideration, despite its very limited value, when there is absolutely nothing else. See B-169491, June 16, 1980.

4. Some Other Principles

Many other principles or "canons" of construction exist to aid in the interpretation of statutes. Again, they are guidelines rather than rigid rules, and their application depends on their relationship to the totality of available evidence. We note here a few useful points.

a. Title

The title of a statute is relevant in determining its scope and purpose. By "title" in this context we mean the line on the slip law immediately following the words "An Act," as distinguished from the statute's "popular name," if any. For example, Public Law 97-177 is "An Act [t]o require the Federal Government to pay interest on overdue payments, and for other purposes" (title); section 1 says that the act may be cited as the "Prompt Payment Act" (popular name). A public law may or may not have a popular name; it always has a title.

The title of an act may not be used to change the plain meaning of the enacting clauses. It is evidence of the act's scope and purpose, however, and may legitimately be taken into consideration to

resolve ambiguities. E.g., Lapina v. Williams, 232 U.S. 78, 92 (1914); White v. United States, 191 U.S. 545,550 (1903); Church of the Holy Trinity v. United States, 143 U.S. 457.462-63 (1892); United States v. Fisher, 6 U.S. (2 Cranch) 358,386 (1805); 36 Comp. Gen. 389 (1956); 19 Comp. Gen. 739,742 (1940). To illustrate, in Church of the Holy Trinity, the Court used the title of the statute in question, "An act to prohibit the importation and migration of foreigners and aliens under contractor agreement to perform labor in the United States," as support for its conclusion that the statute was not intended to apply to professional persons, specifically in that case, ministers and pastors.

The utility of this principle will, of course, depend on the degree of specificity in the title. Its value has been considerably diminished by the practice, found in many recent statutes such as the Prompt Payment Act noted above, of adding on the words "and for other purposes."

b. Punctuation

Punctuation may be taken into consideration when no better evidence exists, although punctuation or the lack of it should never be the controlling factor. For example, whether an "except" clause is or is not set off by a comma may help determine whether the exception applies to the entire provision or just to the portion immediately preceding the "except" clause. E.g., B-218812, January 23, 1987.

Punctuation was a relevant factor in the majority opinion in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42 (1989). A number of additional cases, which we do not repeat here, are cited in Justice O'Connor's dissenting opinion, 489 US. at 249.

c. Effect of Omission

In the course of researching legislative history, you occasionally find a provision especially pertinent to your inquiry that was in the original version of a bill but was deleted later in the legislative process, or was proposed in a floor amendment but not adopted. It is tempting to draw inferences from the omission. For example, if an amendment is proposed to exempt a particular situation but is rejected, it might seem that Congress obviously did not want the exemption.

However, unless the legislative history explains the reason for the omission or deletion or the reason is indisputably clear from the

context, drawing conclusions is little more than speculation. Perhaps Congress did not want that particular provision; perhaps Congress felt it was already covered in the same or other legislation. Absent an explanation, the effect of such an omission or deletion is simply inconclusive. Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935); Southern Packaging and Storage Co. v. United States, 588 F. Supp. 532,549 (D.S.C. 1984); 63 Comp. Gen. 498,501-02 (1984); 63 Comp. Gen. 470,472 (1984).

d. Similar Words in Same Statute

When Congress uses the same term in more than one place in the same statute, it is presumed that Congress intends for the same meaning to apply absent evidence to the contrary. The Comptroller General stated the principle as follows in 29 Comp. Gen. 143, 145 (1949), a case involving the term "pay and allowances":

> "[I]t is a settled rule of statutory construction that it is reasonable to assume that words used in one place in a legislative enactment have the same meaning in every other place in the statute and that consequently other sections in which the same phrase is used may be resorted to as an aid in determining the meaning thereof: and, if the meaning of the phrase is clear in one part of the statute and in others doubtful or obscure, it is in the latter case given the same construction as in the former. "

A corollary to this principle is that when Congress uses a different term, however closely related, it intends a different meaning. E.g., 56 Comp. Gen. 655, 658 (1977) (term "taking line" presumed to have different meaning than "taking area" which had been used in several other sections in the same statute).

5. Retroactivity of Statutes

The traditional rule has been that statutes and amendments to statutes are construed to apply prospectively only (that is, from their date of enactment or other effective date if one is specified). Under this traditional rule, statutes are not construed to apply retroactively unless a retroactive construction is required by express language or by necessary implication or unless it is demonstrated that this is what Congress clearly intended. 38 Comp. Gen. 103 (1958); 34 Comp. Gen. 404 (1955); 28 Comp. Gen. 162 (1948); 16 Comp. Gen. 1051 (1937); 7 Comp. Gen. 266 (1927); 5 Comp. Gen. 381 (1925); 2 Comp. Gen. 267 (1922); 26 Comp. Dec. 40 (1919); B-205180, November 27, 1981; B-191 190, February 13, 1980; B-162208, August 28, 1967. This has also been the traditional rule of the courts. E.g., Greene v. United States, 376 U.S. 149 (1964).

A measure of confusion arose with the Supreme Court's decision in Bradley v. Richmond School Board, 416 U.S. 696 (1974). In that case, the Court held that when a law changes subsequent to a judgment of a lower court, whether the change is constitutional, statutory, judicial, or administrative, an appellate court must apply the new law, i.e., the law in effect when it renders its decision, unless applying the new law would produce manifest injustice or unless there is statutory direction or legislative history to the contrary. Relevant factors in making the "manifest injustice" determination are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Id. at 717. Whether Bradley was intended to replace the tradition=] rule, or whether it was merely a limited exception applicable to post-judgment changes for cases on appeal, was not clear. What did become clear was that, to the extent Bradley superseded the traditional rule, what had once been a fairly simple question had become a very complicated one. See, e.g., 64 Comp. Gen. 493 (1985), concluding that Bradley does not require retroactive application of the administrative offset provisions of the Debt Collection Act of 1982.

Subsequent action by the Supreme Court suggests that Bradley may be the exception rather than the rule. In a 1988 decision, the Court said:

"Retroactivity is not favored in the law. Thus, congressional **enactments** and administrative rules will not be construed to have retroactive effect. unless their language requires this result. E.g., Greene v. United States, 376 U.S. 149, 160. . . ."

Bowen v. Georgetown University Hospital, 488 U.S. 204,208 (1988).

More recently, the Court has acknowledged, but did not resolve, the "apparent tension" between Bradley and Bowen. Kaiser Aluminum & Chemical Corp. v. Bonjorno, U.S. , 110 S. ct. 1570, 1577 (1990). The Court of Appeals for the Federal Circuit has been more blunt, viewing the "tension" as an "irreconcilable conflict," and choosing to follow the Bowen rule. Sargisson v. United States, 913 F.2d 918, 922-23 (Fed. Cir. 1990). See also Mai v. United States, 22 Cl. Ct. 664,667-68 (1991).

Another line of cases has dealt with a different aspect of retroactivity. GAO is reluctant to construe a statute to retroactively abolish or diminish rights which had accrued before its enactment unless this was clearly the legislative intent. For example, the Tax Reduction Act of 1975 authorized $50 "special payments" to certain taxpayers. Legislation in 1977 abolished the special payments as of its date of enactment. GAO held in B-190751, April 11, 1978, that payments could be made where payment vouchers were validly issued before the cutoff date but lost in the mail. Similarly, payments could be made to eligible claimants whose claims had been erroneously denied before the cutoff but were later found valid. B-190751, September 26, 1980.

6. Errors in Statutes

a. Clerical or Typographical Errors

A statute may occasionally contain what is clearly a technical or typographical error which, if read literally, could alter the meaning of the statute or render execution effectively impossible. In such a case, if the legislative intent is clear, the intent will be given effect over the erroneous language.

In one situation, a supplemental appropriation act made an appropriation to pay certain claims and judgments as set forth in Senate Document 94-163. Examination of the documents made it clear that the reference should have been to Senate Document 94-164, as Senate Document 94-163 concerned a wholly unrelated subject. The manifest congressional intent was held controlling, and the appropriation was available to pay the items specified in Senate Document 94-164. B-158642 -O. M., June 8, 1976. The same principle had been applied in a very early decision in which an 1894 appropriation provided funds for certain payments in connection with an election held on "November fifth," 1890. The election had in fact been held on November 4. Recognizing the "evident intention of Congress," the decision held that the appropriation was available to make the specified payments. 1 Comp. Dec. 1 (1894). See also 11 Comp. Dec. 719 (1905); 8 Comp. Dec. 205 (1901); 1 Comp. Dec. 316 (1895).

In another case, a statute authorized the Department of Agriculture to purchase "section 12" of a certain township for inclusion in a national forest. However, section 12 was already included within

the national forest, and it was clear from the legislative history that the "section 12" was a printing error and the statute should have read "section 13." The Comptroller General concluded that the clear intent should be given effect, and that the Department was authorized to purchase section 13. B-127507, December 10, 1962.

More recently, Congress authorized awards for cost savings disclosures, and added the new provisions to the existing Government Employees Incentive Awards Act. The new authority was to terminate on September 30, 1984, but the sunset provision erroneously used the word "title" instead of "subchapter." Read literally, the entire Incentive Awards Act would have terminated at the end of FY 1984, a result that was clearly not intended. GAO concluded that the statute could be construed as if the correct word had been used. 64 Comp. Gen. 221 (1985). The mistake was corrected when Congress later extended the sunset date.

Courts have followed the same approach in correcting obvious printing or typographical errors. See Ronson Patents Corp. v. Sparklets Devices, Inc., 102 F. Supp. 123 (E.D. Mo. 1951); Fleming v. Salem Box Co., 38 F. Supp. 997 (D. Ore. 1940); Pressman v. State Tax Commission, 204 Md. 78, 102 A.2d 821 (1954); Johnson v. United States Gypsum Co., 217 Ark. 264, 229 S.W.2d 671 (1950); Baca v. Board of Commissioners, 10 N.M. 438, 62 P. 979 (1900).

b. Error in Amount Appropriated

A 1979 decision illustrates one situation in which the above rule will not apply. A 1979 appropriation act contained an appropriation of $36 million for the Inspector General of the Department of Health, Education, and Welfare. The bills as passed by both Houses and the various committee reports specified an appropriation of only $35 million. While it seemed apparent that the $36 million was the result of a typographical error, it was held that the language of the enrolled act signed by the President must control and that the full $36 million had been appropriated. The Comptroller General did, however, inform the Appropriations Committees. 58 Comp. Gen. 358 (1979). See also 2 Comp. Dec. 629 (1896); [1] Bowler, First Comp. Dec. 114 (1894).

However, if the amount appropriated is a total derived from adding up specific sums enumerated in the appropriation act, then the amount appropriated will be the amount obtained by the correct

addition, notwithstanding the specification of an erroneous total in the appropriation act.. 31 U.S.C. § 1302; 2 Comp. Gen. 592 (1923).

In recent years, Congress has on occasion authorized the Clerk of the House to make certain corrections in the printed enrollment of appropriation bills. E.g., Pub. L. No. 100-454, § 2(a)(2), 102 Stat. 1914 (1988) (FY 1989 appropriation bills). However, the authority is limited to spelling, punctuation, and stylistic corrections and does not extend to altering amounts.

7. Statutory Time Deadlines

Statutes may contain a variety of time deadlines directed at government agencies. Some, statutes of limitations being the prime example, are usually mandatory. Miss a statute of limitations and, with very few exceptions, you've lost the right to file the claim or commence the lawsuit. Other time deadlines may be either mandatory or "directory." If a time deadline on an agency action is directory only, missing the deadline will not deprive the agency of the authority to take the action.

The general rule followed in most circuits is:

"[a] statutory time period is not mandatory unless it both expressly requires an agency or pub] ic official to act within a particular time period and specifies a consequence for failure to comply with the provision.'"

St. Regis Mohawk Tribe v. Brock, 769 F.2d 37,41 (2d Cir. 1985), cert. denied, 476 U.S. 1140, quoting Fort Worth Nat'l Corp. v. FSLIC, 469 F.2d 47,58 (5th Cir. 1972).[57]

The St, Regis case concerned a provision in the Comprehensive Employment and Training Act which required the Secretary of Labor to investigate complaints alleging improprieties and to issue a final determination not later than 120 days after receiving the complaint. The issue was whether failure to meet the 120-day deadline barred the government from attempting to recover misused funds. Applying the above rule, the court held that it did not.

The issue was litigated in other circuits. The circuits split, St. Regis representing the majority view. One of the minority cases went to the Supreme Court which, in Brock v. Pierce County, 476 U.S. 253

[57] St. Regis cites several additional cases for the proposition.

(1986), agreed with the St. Regis result. While the Supreme Court treated favorably the rule espoused in St. Regis, it stopped short of expressly adopting it. The Court first noted that "[t]his Court has never expressly adopted the Circuit precedent [the St. Regis rule] upon which the Secretary relies. However, our decisions supply at least the underpinnings of those precedents." Id. at 259-60. The Court then cautioned, however, that "[w]e need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute." Id. at 262 n.9. Noting that treating the deadline as mandatory would prejudice important public rights (the right of the taxpayers to guard against misuse of public funds), the Court held that the mere use of the word "shall" in the statute did not make it mandatory. Id. at 261-62.

Thus, while the St. Regis rule remains a reasonably reliable guideline, its precise parameters await future development.. At a minimum, it would seem, the statutory deadline must be cast in mandatory terms. Failure to specify a consequence of missing the deadline will be relevant, but perhaps can be overcome by persuasive legislative history indicating a contrary intent. Another relevant factor is the nature of the rights or interests involved, public or private, and the extent to which they will be affected by the mandatory/directory determination.

One context in which statutory deadlines are more likely to be found directory is the termination of temporary public commissions. In Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977), for example, the court held that a statutory time limit on the existence of the Micronesia Claims Commission was directory and did not preclude further consideration of claims which had been denied on allegedly improper grounds.

A temporary commission is frequently required to submit a report as its final official act. The enabling statute often provides a deadline for submitting the report, with the commission to go out of existence a specified time period after submitting the report. GAO has found these deadlines to be directory only, concluding that a commission which fails to submit its final report on time is authorized to continue in existence, the termination period being measured from the actual submission of the report, B-225832.6, July 8, 1987; B-21 1021, May 3, 1984. As the 1984 decision points out, the

commission does not thereby acquire permanent existence; Congress retains control through oversight and the appropriations process.

As noted, a relevant factor in assessing the effect of a statutory deadline is the nature and effect of any rights or interests affected. In some circumstances, missing a deadline may provide the basis for challenging agency action in denying benefits that would have been available had the agency acted in a more timely fashion. Thus, one court held that the Environmental Protection Agency was required, to the extent of available budget authority, to fund certain water quality grant applications submitted after the end of the fiscal year where the delay was attributable to the agency's failure to issue guidelines within the statutorily-prescribed time period. National Association of Regional Councils v. Costle, 564 F.2d 583 (D.C.Cir. 1977). In determining the effect of a statutory time limit, "a court should consider the purpose and design of the entire statutory program of which it is a part." Id. at 591. The same result would probably not apply under the Stewart B. McKinney Homeless Assistance Act since the legislation provided for the use of guidelines under prior programs during the interim period until new guidelines were issued. Delay in issuing the McKinney guidelines would thus not have the same effect as in Costle. B-229004-O. M., February 18, 1988.

In sum, a statutory time deadline on agency action will generally be regarded as directory rather than mandatory where the statute does not specify a consequence of non-compliance. It maybe found mandatory, however, if there is persuasive legislative history indicating that intent, or if significant rights or interests would be prejudiced by failing to enforce the deadline.